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No. 80-5392

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT HOWE, SR., PETITIONER

v.

BENJAMIN CIVILETTI, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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The facts of this case are set out in our Brief for the Federal Respondents filed with the Court on November 4, 1980. Petitioner seeks review of a decision of the United States Court of Appeals for the Second Circuit affirming the denial of injunctive relief to prevent his transfer from a Vermont state prison to a federal prison pursuant to a contract entered into between the United States and the State of Vermont under 18 U.S.C. 5003(a). Specifically, he contends that the transfer provisions of Section 5003 are applicable only upon a showing that he needs and there exists a specialized treatment program that is available in the federal prison system and not available within the state prison system.

As discussed in our initial brief (at 5-6), there is a conflict among the courts of appeals on the issue presented by this case. On the one hand, both the court of appeals in this

case[1] and the First Circuit in Sisbarro v. Warden, 592 F.2d 1, 4, cert. denied, 444 U.S. 849 (1979), have rejected the claim that Section 5003 places any substantive restrictions on the purposes for which state prisoners may be transferred to federal facilities and, accordingly, have imposed no procedural prerequisites on such transfers. This position recently was adopted by the Third Circuit as well. Beshaw v. Fenton, No. 79-1777 (Dec. 15, 1980). In Lono v. Fenton, 581 F.2d 645 (1978), on the other hand, the en banc Seventh Circuit held that 18 U.S.C. 5003 conditions the authority of federal officials to accept custody of state prisoners on a showing that the prisoners are in need of specialized treatment available only in the federal prison system.

At the time we filed our initial response to the petition, the issue was again before the Seventh Circuit in McKay v. Wilkinson, No. 79-2364, and 11 consolidated cases. Because the en banc court of appeals had been closely divided in Lono and no court outside the jurisdiction of the Seventh Circuit had followed Lono, there seemed to be a realistic possibility that Lono might be overruled. We accordingly suggested that this Court hold the present petition pending the Seventh Circuit's decision in McKay v. Wilkinson, because that decision might eliminate the conflict, in which case there would be no need for this Court's intervention.

On December 23, 1980, the Seventh Circuit decided the pending appeals (sub. nom. Anthony v. Wilkinson, Nos. 79-2362

1/ The opinion in the present case has now been reported. 624 F.2d 454.

et al.).[2] For the most part, the court adhered to the view in Lono that Section 5003 "requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system" (slip op. 11), observing that "principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in Lono" (slip op. 13). While recognizing (slip op. 13) that transfers based on security considerations may satisfy the "specialized treatment" requirement of Lono "if a sufficient array of [therapeutic or rehabilitative] programs is provided in connection with incarceration in a maximum security prison,"[3] the court nonetheless held that the transfers at issue in those appeals were impermissible because the prisoners had not been accorded due process.[4] Contrasting the discretionary transfer of prisoners within a particular system upheld by this Court in Meachum v. Fano, 427 U.S. 215 (1976), and Montanye v. Haymes, 427 U.S. 236 (1976), with the state-to-federal transfer authorized by 18 U.S.C. 5003, the court in Anthony found (slip op. 21) that Section 5003 creates in state prisoners "a liberty interest deserving of due process protection." Accordingly, the court held that "there must be a federally conducted hearing" (slip op. at 27-29) accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see Morrisey v. Brewer, 408 U.S.

2/ By letter dated December 31, 1980, we advised the Court of this development and supplied it with copies of the Seventh Circuit's opinion.

3/ Although we suggested in our initial brief (at 6 n.8) that such a limitation on Lono might eliminate the conflict between it and the present case, in light of the procedural requirements imposed by the Seventh Circuit in Anthony (see infra), a substantial conflict remains.

4/ In Lono, the court had found it unnecessary to decide what process was due a state prisoner prior to his transfer to the federal system (581 F.2d at 646).

471, 489 (1972)) in order to determine "the need for specialized treatment and how it could be met in the federal system" (slip op. 26).5/

While the latest Seventh Circuit decision appears to represent some modification of its prior outright rejection of security needs as a justification for transfer under Section 5003, that court continues to read the statute as being significantly conditioned upon the need for and provision of specialized treatment in the federal facilities. Its approach thus continues to conflict with the interpretation given to the same statute by the First, Second and Third Circuits. Indeed, the conflict among the circuits is enhanced by the addition of new procedural requirements by the Seventh Circuit not imposed by the others.

This is an area in which a uniform national rule is important. The latest decision of the Seventh Circuit leaves the subject governed by inconsistent and conflicting rules. Accordingly, it is our position that the issue of the proper construction of 18 U.S.C. 5003 now requires resolution by this Court.

5/ Petitioner, like most of the prisoners whose cases were resolved in Anthony, was afforded a hearing by state prison officials prior to his transfer to federal custody (see Pet. App. B112-B113; slip op. 5-9 & nn.5-9). Under Anthony, such state hearings alone are insufficient to provide the process that is due. The Seventh Circuit apparently would approve, however, either a bifurcated or a joint procedure whereby state officials would make an initial determination regarding the need of a particular inmate for specialized treatment unavailable in the state of conviction, which determination could be affirmed by the federal officials, who would then go on to determine whether there were federal facilities that would satisfy the inmate's need (slip op. 29-30).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. McCREE, JR.
Solicitor General

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Respondents.

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the authority of the Federal Bureau of Prisons to receive state prisoners into federal penal or correctional institutions is limited by statute to cases where appropriate treatment facilities and personnel are available in the federal prison system for inmates with specialized treatment needs.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Vermont (J.A. 31-37) is reported at 480 F.Supp. 111 (1979). The opinion of the United States Court of Appeals for the Second Circuit (J.A. 38-45) is reported at 625 F.2d 454 (1980).

JURISDICTION

The judgment of the Court of Appeals (J.A. 46-47) was entered on June 23, 1980. A petition for a writ of certiorari was timely filed by mailing on September 11, 1980 and docketed in the Supreme Court on September 15, 1980. Certiorari was granted on January 26, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §4001(a), "Limitation on detention; control of prisons," provides

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

18 U.S.C. §5003, "Custody of State offenders," reads as follows:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.
>
> (b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.
>
> (c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.
>
> (d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

STATEMENT OF THE CASE

The petitioner was convicted of murder in a Vermont court and sentenced to life imprisonment on December 13, 1976. J.A. 32. He had been in state custody at the St. Albans Diagnostic and Treatment Facility for several months prior to his sentencing.

A hearing was held by the State Department of Corrections in February 22, 1977 to determine whether he should be transferred from St. Albans to the federal prison system. J.A. 21. The hearing officer recommended the transfer and the Vermont Commissioner of Corrections approved it on March 9, 1977. J.A. 19-20. Petitioner was sent first to the United States Penitentiary at Atlanta, Georgia. After a stay of approximately nine months in Atlanta he was transferred to the United States Penitentiary at Terre Haute, Indiana, where he is currently incarcerated. Transcript of August 21, 1979 (hereinafter "Trial Transcript") pp. 38-40; J.A. 33.

In a complaint filed December 5, 1978 in the United States District Court for the District of Vermont the petitioner challenged his transfer to the federal authorities on the ground that the federal Bureau of Prisons lacked statutory authority to accept custody. He alleged that the Attorney General and the Director of the Bureau of Prisons had not made any determination that an appropriate and adequate treatment program existed for him in the Federal Prison System. J.A. 4 para. 7. He further alleged that none had been provided; he was merely incarcerated. J.A. 4 para. 8. It was petitioner's position that the sole statutory authority for transfers of state inmates, 18

U.S.C. §5003, required individual determinations by the federal authorities that "proper and adequate treatment facilities are available"; no individual determination had been made and in any case the transfer had not been effected for special treatment needs but for general penalogical reasons: maximum security incarceration and the normal types of prisoner programming. Trial Transcript 2, 6.

It was conceded by the State Department of Corrections (which was permitted to intervene in the case) that the State Commissioner of Corrections, for his part, does not "designate an inmate be transferred to go to a specific program at a given institution," although he has a general awareness of federal prison programs. Trial Transcript 9; J.A. 32-33. After determining to make a transfer the Commissioner delivers the prisoner to the Bureau of Prisons at the Metropolitan Correctional Center in New York City, "and they take over from there." Once in the federal system the state inmate is programmed in the same way as federal prisoners. Trial Transcript 9-10. Following the state's decision to transfer in this case (and generally) the State Corrections Department received no notice or certification issued by the Bureau of Prisons to the effect that a treatment program was available. Trial Transcript 27.

The Bureau normally accepts all prisoners referred to it, but reserves the right to refuse an inmate; it refused in one case to accept a transvestite who had undergone part but not all of a sex change operation. Deposition of James W. Tippy, August 13, 1979 (hereinafter "Tippy

Deposition") p. 8.[1] In another case, an inmate was returned to the state for protective custody reasons, the state agreeing to the re-transfer. Trial Transcript 29-30. With such exceptions state inmates are placed in the federal system according to the same criteria used for federal prisoners. Tippy Deposition 9, 23, 25.

The federal penitentiaries at Atlanta and Terre Haute offer "psychiatric counselling, alcoholics anonymous meetings, drug abuse sessions, educational courses and vocational and work training." Also "religious programs . . . a library, television, movies and various athletic programs." J.A. 33. The programs in the state prison were substantially similar but were somewhat less accessible to petitioner because of his maximum security status; while in state custody he received "psychiatric counselling and educational courses but others probably were available to him if he wished." J.A. 33. Petitioner testified that a psychiatrist at Terre Haute told him he did not need psychiatric help and the counselling was stopped. Trial Transcript 40. He had been employed running a sewing machine until a recent heart attack. "His principal activities now are knitting and crocheting." Trial Transcript 49; J.A. 33.

The Second Circuit, in response to Howe's claim that his transfer could only be justified by specialized treatment needs took the view that "such a showing in Howe's case might be difficult. Given the nature of his

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[1] The Tippy deposition was filed after the trial, J.A. 1, and received in evidence, Trial Transcript 51-52.

crime and the length of his sentence, it is likely that deterrence rather than hopes of reform provided the basis of his imprisonment." J.A. 42 n. 4.

The government took the position that neither the state nor the federal government is required to make an individualized determination that particular treatment programs are available in the federal system. Trial Transcript 3,4. As authority for the transfer and "certification" by the Bureau of Prisons it points to an agreement between the state and federal governments dated February 25, 1975, which recites in a preamble that "The Director of the Bureau of Prisons has certified that facilities are available" at "federal institutions." J.A. 10. Under the contract the state could send up to 40 state inmates to the Bureau, without the Bureau's prior approval; if the state wanted to send more than forty, individual applications were required. J.A. 11. The state was to deliver them to the Federal Correctional Facility in New York City (now the Metropolitan Correctional Center) to be received in federal custody. Petitioner's transfer was effected pursuant to this contract. J.A. 11,40.

SUMMARY OF THE ARGUMENT

18 U.S.C. §5003(a) grants the Attorney General limited authority to confine state or territorial inmates when "proper and adequate treatment facilities and personnel are available." The phrase refers to specialized programs mandated by Congress for particular classes of inmates, and also to other programs or institutions which can be

called "treatment facilities" in common speech. These include programs for youth, young adults, narcotics addicts, alcoholics, the mentally ill, and inmates with physical ailments or disabilities. Thus, the Youth Corrections Act mandates a special sentencing program for the "treatment" of youth. 18 U.S.C. §5010(b). The phrase "proper and adequate treatment facilities and personnel" appears also in §5012 of the YCA. Eligible prisoners under the Narcotics Addict Rehabilitation Act are also sentenced to "treatment." 18 U.S.C. §4253(a). Alcoholism has been Congressionally defined as an illness, and facilities established for alcoholics under the Comprehensive Alcohol Abuse and Alcohol Prevention Treatment and Rehabilitation Program, 42 U.S.C. Ch. 60, are also treatment facilities. The mentally and physically ill or handicapped are also in need of "treatment facilities" as that term is used in common English. Congress and the Bureau have established special treatment facilities for them. Legislative history supports the proposition that Congress, in enacting §5003, intended to authorize federal custody only in cases of special treatment needs.

The court below held that the term "treatment facilities" referred broadly to federal prisons, inasmuch as federal prisons have a reforming or "treatment" goal. J.A. 44-45. The reference to treatment was, moreover, entirely nominal. The transferred prisoner need not receive any rehabilitative "treatment" in the receiving institution. J.A. 44-45. The Seventh Circuit in *Anthony, et al.* v. *Wilkinson, et al.*____F.2d____(December 23, 1980)

held that the prison's rehabilitative goal must be more than nominal; that a "sufficient array of rehabilitative programs" was required to justify a transfer under §5003.

Neither of these constructions is supportable. Both do violence to the plain meaning of the statute. Nowhere in the statutes are prisons referred to generically as "treatment facilities." Legislative history points to the contrary conclusion. The general rule that agency interpretations of a statute are to be given weight is inapplicable to this case. The Bureau of Prisons' expansive reading of §5003 is of uncertain origin and was never promulgated in any rule or published order. The Bureau's formal regulations, by contrast, retain the statute's "treatment facilities" language.

State inmates have an expectation, under §5003, that they will not be transferred to the federal prison system except in cases of special treatment needs where the Bureau can offer appropriate treatment facilities. They have a right to hearing, such as that afforded inmates in *Vitek* v. *Jones,* 445 U.S. 480 (1980), on these issues.

After transfer to federal facilities, state prisoners must be returned to their states once treatment has been terminated. The Bureau can not reclassify or retransfer them out of treatment facilities while retaining custody of them for the remainder of their prison sentences.

Vermont's claim that it can not confine the petitioner except in the federal system is unfounded. The state was able to hold him in the state for many months before the transfer. If state facilities are in fact inadequate, Vermont

can resort to transfers under the New England and Interstate Corrections Compacts, 28 V.S.A. §§1401-1410, 1601-1610, or it can upgrade existing facilities or construct new ones.

Inmates transferred thousands of miles from their homes suffer a kind of banishment inflicting deprivations above and beyond those of normal incarceration. It is recognized that transfers are generally detrimental to the rehabilitative process.

Construing the statute as the Bureau does opens the door to a national, not a federal prison system. If Congress had meant this major reshaping of our penal systems, it would not have accomplished it by oblique reference to treatment facilities.

ARGUMENT

18 U.S.C. §5003 GRANTS THE ATTORNEY GENERAL LIMITED AUTHORITY TO ACCEPT STATE AND TERRITORIAL INMATES WITH SPECIAL TREATMENT NEEDS INTO FEDERAL "TREATMENT FACILITIES" AS THAT TERM IS USED BY CONGRESS AND IN COMMON SPEECH.

At issue in this case is the construction of 18 U.S.C. §5003(a) which authorizes the Attorney General to accept state inmates into federal prisons on a contract basis. The section reads as follows:

> (a) The Attorney General, when the Director [of the Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the cus-

> tody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

In 1978 the Seventh Circuit, *en banc*, held in a prisoner's habeas corpus proceeding that the statute authorizes transfers of state or territorial inmates for special treatment needs; the section "was not intended . . . to put the federal government in the rent-a-prison business unless there was some special treatment need with which the state required assistance." *Lono* v. *Fenton*, 581 F.2d 645, 648 (7th Cir. 1978). Because confinement of citizens in federal prisons is prohibited "except pursuant to an act of Congress," 18 U.S.C. §4001(a), Lono was ordered returned to the custody of the state. Three judges joined in a vehement dissent, arguing that §5003 imposed no "substantive limitation or restriction" on the Attorney General's power to accept state prisoners. 581 F.2d at 649.

The reaction to *Lono* was swift and almost unanimously negative. In *Sisbarro* v. *Warden*, 592 F.2d 1, *cert. denied* 444 U.S. 849 (1979), the First Circuit held with the *Lono* dissent, finding no "substantive limitation" in the statute. The Second Circuit followed with its decision in this case, construing the phrase "treatment facilities" as a euphemism for "federal prison." J.A. 44-45. The Third Circuit agreed with this construction in *Beshaw* v. *Fen-*

ton, ____ F.2d ____ (No. 79-1777, December 15, 1980).[2] Faced with this rejection of *Lono*, the Seventh Circuit modified its position in *Anthony* v. *Wilkinson*, ____ F.2d ____ (Nos. 1361-2571, 2374, 2410-2412, 2485-2488, 2531-2533, 2567, Dec. 23, 1980) holding that a "sufficient array of rehabilitative programs" in a prison could constitute specialized treatment under the statute.

We argue below that *Lono* was correctly decided. The term "treatment facilities" in §5003 can not be construed to mean prison without breaking the most fundamental rules of statutory construction. Nor does it mean simply a sufficiently benign and rehabilitative prison, the *Anthony* court's construction. It means what Congress has said it means in related contexts, specialized programs or institutions for specific types of offenders: youth under twenty-two years old and young adults twenty-two to twenty-six, narcotics addicts, alcoholics, mental patients, and any inmate in need of medical care.

A. Treatment Facilities Are Institutions and Programs for Special Treatment Needs; The Term is Not a Euphemism for Prison.

The statute authorizes the enrollment of state prisoners in federal "treatment facilities," once the Bureau certifies that such facilities are available. The clause

[2] District Court opinions also generally rejected *Lono*. A District Court in the Tenth Circuit followed the *Lono* dissent, *Fletcher* v. *Warden*, 467 F.Supp. 777 (D. Kan. 1979). Before the *Beshaw* decision, District Courts in the Third Circuit were in disagreement, *Ali* v. *Gibson*, 483 F.Supp. 1102, 1124 (D. V.I. 1980) preferring the *Lono* majority and *Bowers* v. *Fenton*, 488 F.Supp. 570 (M.D. Pa. 1979) holding with the *Lono* dissent.

requiring certification would be meaningless if the prisoner could, upon certification, be transferred to something which was not a "treatment facility." When the certification is made, the Bureau may contract for "custody, care, subsistence, education, treatment, and training"; the Bureau undertakes to be in charge of everything, including treatment. This much, at least, is clear from the face of the statute.

The term "treatment facilities" can not be a euphemism for prison as the Second Circuit thought.[3] The language was taken *in haec verba* from the Youth Corrections Act, 64 Stat 1086-1089, 18 U.S.C. §§5005-5024, which was enacted in 1950, two years before §5003. Section 5012 of the YCA provides that no offender may be committed under the act until the Director of the Bureau of Prisons

> shall certify that proper and adequate treatment facilities and personnel have been provided.

The phrase "custody, care, subsistence, education, treatment, and training" also exactly tracks the YCA.[4] Com-

[3] The Second Circuit wrote:

> The fact that the statutory language refers to federal prison subject to the legislation as "treatment facilities" adds little to the debate. More plausible than the argument that this phrase was intended to limit the use of the statutory program to persons in need of treatment is the explanation that the phrase simply named those institutions in terms of the most laudable (if, perhaps, least often realized) goal the institutions serve, namely, the reform of prisoners through treatment.

J.A. 44-45.

[4] The First Circuit in *Sisbarro* wrote that this list of functions covered by the contract "runs the gamut of penological purposes."

mitments under the YCA may be made to a non-Bureau facility, in which case the Director may contract

> for the custody, care, subsistence, education, treatment, and training of committed youth offenders . . .

18 U.S.C. §5013

As used in the YCA "treatment facilities" means something different from ordinary prison. The YCA mandated a special and comprehensive sentencing program for the "treatment" of youth convicted of criminal offenses. See *Dorszynski* v. *United States,* 418 U.S. 424, 434 (1974); *Durst* v. *United States,* 434 U.S. 542, 544-547 (1978).

> An integral part of the treatment program was the segregation of the committed persons, insofar as practicable, so as to place them with those similarly committed, to avoid the influence of association

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Sisbarro v. *Warden, supra,* 592 F.2d at 4. Consequently, the court implied, "treatment-facilities" must mean prisons.

The list only runs the gamut of non-penal penological purposes; it omits discipline and punishment. With this qualification, we agree that "custody, care, subsistence, education, treatment, and training" can all be accomplished in a prison. This is not to say, however, that prisons and treatment facilities are synonymous.

The same listing of penological purposes appeared in the Juvenile Delinquency statutes before their amendment in 1974, Public Law 93-415, 88 Stat. 1135. 18 U.S.C. §5034 then provided for the "custody, care, subsistence, education, and training" of juvenile delinquents. The former 18 U.S.C. §5036 provided that these functions could be carried out in foster homes or other public or private agencies.

> with the more hardened inmates serving traditional criminal sentences.

Dorszynski v. *United States, supra,* 418 U.S. at 434.

In *Carter* v. *United States,* 306 F.2d 283 (D.C. Cir. 1962) in an opinion by Chief Justice (then Judge) Burger, the court upheld a four-year YCA commitment against a claim that it was longer than the maximum sentence which an adult could have received. The inmate was committed for a longer time "but under different conditions and terms than a defendant would undergo in ordinary prison." 306 F.2d at 285.

Congress has never referred to prison as "treatment facilities" or treatment anything. The term which appears throughout Title 18 of the Code is "Federal penal and correctional institutions." Thus, 18 U.S.C. §4001(b)(1) vests the Attorney General with control of "penal and correctional institutions"; "penal and correctional institutions" are what the Bureau manages and regulates. 18 U.S.C. §4042(1); 28 C.F.R. §0.95(a). The generic term in the Bureau's regulations is simply "institution," defined to mean "a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Community Treatment Center, Federal Detention Center, or Metropolitan Correctional Center." 28 C.F.R. §500.1(d).

The "treatment facilities" language of §5003 is also unique among prisoner transfer statutes. The Bureau is empowered to transfer prisoners *to* the states. "[f]or the purpose of providing suitable quarters for [their] safekeeping, care and subsistence . . ." for a period of

three years. 18 U.S.C. §4002. The statute does not mention treatment. Persons convicted in a military court-martial may be confined "in any penal or correctional institution under the control of the United States . . ." 10 U.S.C. §858. By regulation the Bureau accepts these military prisoners "if, after examination of all available information, the Bureau of Prisons can provide appropriate resources for the inmate's needs." 28 C.F.R. §527.10(a). The qualification here is suggestive of §5003's phraseology, but far broader; military inmates are not accepted or rejected on the basis of their *treatment* needs or the availability of treatment facilities. Congress has recently enacted elaborate rules governing the transfer of inmates to and from foreign countries pursuant to treaty. 18 U.S.C. §§4100-4115. The Attorney General is empowered under this chapter to receive United States nationals serving sentences in foreign prisons in federal "penal or correctional institutions." §4102(2). The word treatment is used only in connection with two types of prisoners: juveniles (". . . issue regulations for the transfer and treatment of juveniles," §4102(8)), and the mentally ill (§4102(9)).

"Treatment" is as vague as any word in the language. Its primary meaning is therapy. It also has the neutral sense of specified behavior towards another, as in humane or inhumane treatment. The word is used in this neutral way in some of the statutes. Thus, 18 U.S.C. §4081 mandates a system of segregation and classification for the "individualized" treatment of prisoners. There is even a colloquial sense in which treatment means punishment ("the treatment"). "Facilities" is

also ambiguous. It can mean institutions (as in "correctional facilities") or programs and equipment within institutions (as in "educational facilities," "medical facilities," or "athletic facilities").

The two words in combination are somewhat less diffuse. The term "treatment facilities" can denote programs as well as institutions. But it does not, except in a far-fetched way, mean schools, vocational programs, or athletic facilities. Nevertheless, the precise content of the term is not obvious and resort to legislative history is in order.

Congress passed the YCA in 1950. Less than a year later the future §5003 was introduced in the Senate as S.2160 at the request of Deputy Attorney General Peyton Ford who explained the purpose of the bill in a letter accompanying the draft:

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but not available to the States. These requests usually relate to juveniles, concerning whom many of the States are without satisfactory institutions and training programs.

S. Rep. No. 978, 82 Cong., 1st Sess. 2 (1951).

The Committee Report appends the entire letter and the quoted passage is excerpted in the body of the Report.

On the Senate floor Senator McCarran was asked for an explanation of the bill. He replied that the current law

allowed the Attorney General "to make contracts with State officials for the purpose of temporary confinement of Federal prisoners [18 U.S.C. §4002]. This bill would authorize a more or less reciprocal arrangement whereby, *under certain conditions in a limited category of cases* . . . the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws." 97 Cong. Rec. 13543 (1951). The bill passed the Senate without further debate.

S. 2160 was then referred to the House Judiciary Committee which recommended passage in a report which emphasized that its purpose was to make federal treatment programs available to the states. In its Statement of the bill, the report recites,

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts, concerning whom many of the States are without satisfactory institutions and training programs.

H.R. Rep. No. 1663, quoted in 1952 U.S. Code Cong. and Administrative News, p. 1421.

The bill was meant "to accommodate those State offenders that are in need of the various types of treatment that Federal institutions are providing." The expenses "in connection with an inmate's subsistence, medications, etc." would be borne by the states. Id. In its discus-

sion of the contents of the bill the Committee wrote:

> The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act (sec. 5006g, title 18, U.S.C.).

Id.

The bill passed the House without debate or amendment on May 5, 1952, 98 Cong. Rec. 4801, and President Truman signed it into law on May 9, 1952. 98 Cong. Rec. 4967.

Its placement in the Code, as an addition to Part IV of Title 18, under the caption "Correction of Youthful Offenders," was provided for by the Act itself. Public Law 333, May 9, 1952, c. 253, §2, 66 Stat. 68.

After the *Lono* decision the government submitted a proposed amendment to §5003 to the Senate Judiciary Committee, replacing the phrase "treatment facilities" with the generic "penal or correctional facilities." The draft read as follows:

> The Director may contract with the proper authorities of a State, territory, or locality, or, at the request of the tribal leaders, with an Indian tribe, for the official detention, including safekeeping, care, subsistence, correctional programs and employment, in a federal penal or correctional facility, of a person convicted of an offense in a court of such

> State or territory or Indian tribe, if the Director finds that proper and adequate penal or correctional facilities and personnel are available. . . .

S. 1722, 96th Cong., 1st Sess. §573(b)(1980).

The Committee reported the bill favorably, giving no explanation of the change. S. Rep. No. 553, 96th Cong., 2d Sess. 1222-1223.

The House Judiciary Committee was given the same amendatory language and did not approve it. The House Committee made note of the conflicting judicial interpretations of §5003, H. Rep. No. 96-1396, 96th Cong., 2d Sess. 480 (Sept. 25, 1980) and reported a bill which retained §5003's treatment facilities terminology:

> The Attorney General, when the Director certifies that proper and adequate treatment facilities and personnel are available, is authorized to contract with the proper officials of a state for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or territory, but any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

H.R. 6915, 96th Cong. 2d Sess. §3918(a)(1980).

The House and Senate versions were never reconciled and Congress adjourned without voting on them.

The *Lono* court was correct, on the basis of the 1951-1952 legislative history, in deeming the statute's "treatment facilities" language "advisedly used." 581 F.2d at 647. The 1980 Congress was not immediately agreeable

to changing it. Failing to get its amendment through Congress the government now asks the Court to pass on it. If a statute is deemed unwise, the remedy is an act of Congress, not "legislation under the guise of construction." *Dorszynski* v. *United States, supra,* 418 U.S. at 442, quoting *Blockburger* v. *United States,* 284 U.S. 299 (1932). Treatment facilities remains in §5003; Congress did not and courts can not write it out.

B. The Term Treatment Facilities Includes Facilities for Youth, Young Adults, Narcotics Addicts, Alcoholics, and the Mentally and Physically Ill.

Treatment facilities, as a broad euphemism for ordinary prison, was an administrative, not a Congressional usage.

> Correctional managers often speak in terms of diagnosis, of observation, of therapy, and of treatment. The classification teams in institutions are referred to as "treatment" teams, and the activities planned for the offender as he enters prison is called a "treatment" program.

Norman A. Carlson, "The Federal Prison System: Forty-Five Years of Change," 39 Fed. Probation No. 4 p. 37, 39 (June 1975).

Mr. Carlson refers to this as "the myth of the medical model" and condemns it as "inaccurate and misleading." Id.

Congress, by contrast, has used the medical model selectively. Not everyone convicted of a crime against the United States is *ipso facto* ill and in need of treatment. But Congress has found the model and its medical termi-

nology applicable to specific categories of inmates, and has mandated specialized treatment programs to deal with them. These specialized programs are termed "treatment facilities" by statute or in common speech. They cover the following cases: certain offenders under 22 years of age and certain other offenders 22-26 years of age; narcotics addicts; alcoholics; persons suffering from mental illness or mental defects; and inmates suffering physical illnesses or disabilities.

Congress' longstanding practice of defining special groups of offenders along with special therapeutic commitments for them has recently come under criticism in the Senate Judiciary Committee. Proposed amendments to the criminal code would delete the special Narcotics Addict Rehabilitation Act and YCA sentencing procedures and put the decision in the hands of the Bureau. The Senate Judiciary Committee found the current scheme too rigid:

> While 18 U.S.C. §4253 provides for special offender facilities for certain categories of offenders found by a sentencing judge to be narcotic addicts who are "likely to be rehabilitated through treatment", and 18 U.S.C. §5011 provides for special treatment facilities for offenders sentenced as youth offenders, there is no general provision in current law enumerating other possible specialized prison facilities.

S. Rep. 553, 96th Cong., 2d Sess. 1221-2 (1980)

Nevertheless, the following classes of treatment facilities continue to exist:

Youth Corrections Act commitments are to "treat-

ment facilities." We have already noted the explicit legislative reference to the YCA in the legislative history of §5003, and the identity of statutory language between §5003 and §§5012-13. Compare *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750, 755-756 (1979) (same construction where statutes have common purpose and language). The "specialized treatment needs" language in the committee report on §5003 is echoed in the legislative history of the earlier act: the YCA aims at providing "specialized treatment for youth offenders. . . ." House Rep. 2979, quoted in 1950 U.S. Cong. Service 3983, 3993. The statute was intended to place youth, as distinct from adult offenders, within the "medical model" of corrections. See *Watts* v. *Hadden,* 469 F.Supp. 223, 231 (D. Colo. 1979). It intends a system of "treatment" as distinct from "ordinary prison." See *Dorszynski* v. *United States, supra; Harvin* v. *United States,* 445 F.2d 675 (D.C. Cir.), *cert. denied* 404 U.S. 943 (1971); *Johnson* v. *Bell,* 487 F.Supp. 977, 982-987 (E.D. Mich. S.D. 1980); *Watts* v. *Hadden, supra.* Compare *United States* v. *Ortiz,* 513 F.2d 198, 199 (9th Cir.), *cert. denied* 423 U.S. 843 (1975) holding concurrent YCA and adult sentences to be "inconsistent."[5]

A youth offender is a person under twenty-two years of age when convicted. 18 U.S.C. §5006(d). The same sen-

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[5] In *Duncan* v. *Madigan,* 278 F.2d 695, 696 (9th Cir. 1960), *cert. denied* 366 U.S. 919 (1961), an inmate contended that §5003 was limited to Youth Offenders and was summarily turned down. We agree that §5003 can not be so limited, but YCA-type placements were clearly a major part of what Congress had in mind.

tence to "treatment" is available to offenders twenty-two to twenty-six years old, as "young adult offenders" under 18 U.S.C. §4216. §5003 thus covers all state inmates under twenty-six years old who would benefit from treatment.

A second kind of sentence Congressionally defined as "treatment" is the commitment of a narcotics addict under the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§4251-4255. An eligible offender is committed to the Attorney General "for treatment" for an indeterminate period not to exceed ten years or the maximum punishment for the crime. 18 U.S.C. §4253. The term "treatment" under the act

> includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational social, psychological, and vocational services, corrective or preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

18 U.S.C. §4251(c)

Some NARA commitments occur within Bureau prisons. See 42 U.S.C. §225a making appropriations for narcotics programs available to the Bureau. Others are to the Public Health Service for "care and treatment" in a hospital or "other appropriate medical facility." 42 U.S.C. §257(a).

"Treatment facilities" also includes its ordinary medical meanings. 42 U.S.C. §250 provides that the Department of Health and Human Services (formerly the Public Health Service)

> shall supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services,

as authorized by 18 U.S.C. §4005. The United States Medical Center for Federal Prisoners at Springfield, Missouri, is a part of the Federal prison system. See *Van Sirrs* v. *Ciccone,* 437 F.2d 884, 885 (8th Cir. 1971). So, of course, are prison infirmaries located within the other institutions. These are treatment facilities in common speech; the statute permits state prisoners in need of medical treatment to be transferred to federal facilities.

Inmates found to be insane in federal prison may "be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons . . . convicted of offenses against the United States. . . ." 18 U.S.C. §4241. See *Greenwood* v. *United States,* 350 U.S. 366, 373-374 (1956). The Medical Center at Springfield has intensive psychiatric facilities, see *Federal Prison System Facilities,* U.S. Department of Justice (1980) p. 85, as does the Federal Correctional Institution at Butner, North Carolina. Ibid. 27. Such psychiatric institutions are also "treatment facilities" in common parlance.

Another category of inmates whom Congress has defined as "ill" is alcoholics. In a statement of Congres-

sional purpose in the Comprehensive Alcohol Abuse and Alcohol Prevention, Treatment and Rehabilitation Program, 42 U.S.C. Ch. 60, Congress defined alcoholism as "an illness requiring treatment and rehabilitation." 42 U.S.C. §4541(a)(8). It called for "development of methods for diverting problem drinkers from criminal justice systems into prevention and treatment programs." 42 U.S.C. §4541(b)(2). 42 U.S.C. §4554 set up an Interagency Committee on Federal Activities for Alcohol Abuse and Alcoholism, including appropriate representation from the Department of Justice. 42 U.S.C. §4577(a) authorizes grants to set up alcohol programs "in cooperation with law enforcement personnel . . . penal institutions, and other public agencies." See also 42 U.S.C. §225a authorizing grants to the Bureau for "treatment and research programs and facilities for alcoholism" as well as narcotics problems. While alcoholics do not receive sentences to "treatment" like YCA and NARA offenders, they are victims of a Congressionally defined "illness," and alcohol programs must be deemed "treatment facilities" under §5003.

Finally, the Director is permitted to transfer inmates to a "residential community treatment center." 18 U.S.C. §4082. These are pre-release centers offering intensive counselling services to inmates in the months preceding their release; by 1980 nine had been established. *Federal Prison System Facilities, supra,* pp. 98-99. Such centers are also, at least arguably, "treatment facilities" within the meaning of §5003.

Congress has not adopted the "medical model" of corrections for all prisoners, but it has found it applicable to

these special classes. In each of these cases Congress has singled out special types of inmates and mandated or authorized types of commitment different from that of the ordinary prison population. In each case the defining characteristic is a specialized "treatment" need, in a more or less strictly therapeutic sense.

Most of these needs had been identified when §5003 was passed. The House Report refers to juveniles, drug addicts, and medical programs. The NARA, Alcoholism, and young adult offender programs were enacted subsequently. §5003, read to refer to these other statutes, is both definite and flexible. Congress has stated what are to be considered treatment facilities, and it is free to define new types. And of course §5003 also encompasses all facilities opened up by the Bureau without specific Congressional authorization if they can be called "treatment facilities" in common speech.

C. The Right To A Hearing And The Right To Return When Treatment Is Terminated.

1. *The necessity of a pre-transfer hearing on the availability of appropriate treatment facilities.*

Mr. Howe alleged in his complaint that the federal respondents had "not determined that a special treatment program is contemplated or exists for him." J.A. 4 para. 7 (emphasis added). The allegation was borne out. Transfer proceedings held under the State Department of Corrections culminated in a finding, required by state law, that "all in-state treatment and rehabilitative programs available for the inmate have been considered and

found unsuitable." 28 V.S.A. §706(a). See Vermont Department of Corrections Policy No. 891, J.A. 15, criterion No. 1; Transfer Hearing Memorandum of February 22, 1977, J.A. 25. But there was no finding at the state or federal level that treatment programs were available in the Bureau's facilities which were appropriate to Mr. Howe's treatment needs. The Vermont Commissioner had a general knowledge of what programs were to be found in the federal system, and he was also aware of the contract. J.A. 32-33. As we have noted, the contract certifies only that "facilities" are available at "Federal Institutions"; nothing certifies the availability of treatment facilities. J.A. 10. The Bureau, for its part, programmed Howe into the system by the same criteria used for federal prisoners, i.e. custody and general rehabilitation considerations. Tippy Deposition 9, 23, 25. The Second Circuit believed that the federal government would probably not be able to show that it could provide proper treatment. "Given the nature of his crime and the length of his sentence, it is likely that deterrence rather than hopes of reform provided the basis of his sentence." J.A. 42n.4.

Federal imprisonment is prohibited except when specifically authorized. 18 U.S.C. §4001(a). An inmate in state prison has a right or "justifiable expectation," *Montanye* v. *Haymes*, 427 U.S. 236, 243 (1976), rooted §4001(a) and §5003 that he will not be held in a federal institution unless there is a determination that treatment facilities appropriate to his treatment needs exist. Cf. *Meachum* v. *Fano*, 427 U.S. 215, 228 (1976) holding that

no protectable expectation exists when transfers may be effected "for whatever reason or for no reason at all."[6] A prison inmate slated for a transfer under §5003 to a federal treatment facility, like an inmate chosen for transfer to a mental hospital, *Vitek* v. *Jones,* 445 U.S. 480 (1980) is therefore entitled under the due process clause to fair hearing procedures before the determination is made.

Because the Second Circuit construed §5003 to authorize full discretion to accept any state inmate, it viewed the case as indistinguishable from *Meachum* and *Montanye* v. *Haymes;* finding no protectable liberty interest it implicitly found that no process was due.

The Seventh Circuit in *Anthony* reaches the due process question and decides, after extensive discussion, that safeguards similar to those afforded inmates in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole revocation) and in *Vitek* v. *Jones,* are also appropriate here. Because the ultimate finding on the transfer question must, by statute, be made by the Director, the hearings must be held, at least in part, before federal officials.

> According to federal counsel, the Director of the Bureau of Prisons or his representative reviewed each transferee's file and on that basis made a find-

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[6] The hardships of transfers thousands of miles from an inmate's family, counsel and friends are surely different in degree if not in kind from the intra-state transfers considered in *Meachum* and *Montanye* v. *Haymes.* The effects upon the inmate and the rehabilitative process are discussed below, at pp. *32-34.*

> ing that the individual state prisoner was in need of maximum security unavailable in the state but readily available in the federal system. The language of §5003, which states that the Attorney General may contract with the states after certification from the Director of the Bureau that treatment facilities are available, makes clear that the ultimate finding of the need for treatment and of its potential satisfaction in the federal system must come from the Director. In the instant case the federal system accepted these prisoners without any federal participation in, or direct corroboration of the *determination of the need for specialized treatment and of how it could be met in the federal system.*

Anthony v. *Wilkinson,* slip op. 25-26 (emphasis added)

We have no more to add to the Anthony court's thoughtful resolution of this issue. Rather than restating the arguments here, the Court is respectfully referred to pp. 20-30 of that opinion. The lack of a hearing to determine whether proper treatment facilities were available denied the petitioner his right to due process.

2. *The duty to return an inmate once treatment has been terminated.*

The Complaint also alleged that "While Plaintiff was confined in the federal system he was not provided a special treatment program, but merely incarcerated." J.A. 4 para. 8. At the trial he testified that he had initially received some psychological counselling but it was terminated in Terre Haute by the psychologist, who told him

that he no longer needed therapy. The District Court found as fact:

> At Terre Haute plaintiff ran a sewing machine until he had a heart attack, about a month before he was returned to Vermont for this litigation. His principal activities now [i.e. in Terre Haute] are knitting and crocheting.

J.A. 33.

See Trial Transcript, pp. 40, 49,

If Mr. Howe was ever properly enrolled in a federal treatment facility, he no longer is; and the Bureau is under a duty to return him to state custody.

It is true that the Director normally has full statutory authority to transfer federal inmates from one institution to another. 18 U.S.C. §4082(b); *Lawrence* v. *Willingham,* 373 F.2d 731 (10th Cir. 1967); *Rodriquez-Sandoval* v. *United States,* 409 F.2d 529, 532 (1st Cir. 1969). He also has full discretion to re-classify inmates within an institution. *Moody* v. *Daggett,* 429 U.S. 78, 88n. 9 (1976); 18 U.S.C. §4081. But federal inmates as a general rule are committed simply to penal and correctional institutions; they are not specifically committed to "treatment" facilities.

The exceptions to this rule of discretion are those special classes of federal offenders who *are* sentenced to treatment, principally YCA defendants, NARA defendants, and mental commitments.

Thus, in *Harvin* v. *United States, supra,* 445 F.2d 675 (D.C. Cir. 1971) the court construed the specific sentenc-

ing provisions of the YCA "to limit the place in which a sentence under it may be served to an institution where the confinement is consistent with the purposes of the Act to afford treatment and rehabilitation." 445 F.2d 681-682. Similarly, in *United States ex rel. Dancy* v. *Arnold,* 572 F.2d 107 (3d Cir. 1978) the court found that the Bureau's power under §4082 to transfer inmates limited by the YCA; the "Attorney General's authority under 18 U.S.C. §4082 to designate the place of confinement of federal prisoners is limited in this case by the terms of the YCA; he has no discretion to confine a youth offender contrary to the terms of his sentence." 572 F.2d at 114. See also *Johnson* v. *Bell, supra,* 487 F.Supp. 977, 982-987; *Watts* v. *Hadden, supra,* 469 F.Supp. 223. Compare *United States ex rel. Sero* v. *Preiser,* 506 F.2d 1115 (2d Cir. 1974) *cert. denied* sub nom. *Preiser* v. *Sero,* 421 U.S. 921 (1975). In that case youth offenders had been committed by the state to terms of special incarceration, which were longer than the maximum sentence an adult could have received for the same offense. It was found that the incarceration was not special at all, but was indistinguishable from normal prison. The Second Circuit affirmed the grant of habeas corpus finding, in the absence of special types of incarceration, no *quid pro quo* for the longer terms. 506 2d 1124. Cf. *Carter* v. *United States, supra.*

NARA defendants are also committed to "treatment" and this imposes some limit on the Bureau's power to transfer and classify them. Thus, in *Hazel* v. *Carlson,* 557 F.2d 50 (2d Cir. 1977) a NARA inmate was transferred from Danbury Correctional Institution to Lewisburg

Penitentiary. He claimed that the Bureau operated only five prisons with drug treatment facilities for NARA defendants; Danbury was one of them but Lewisburg was not. The District Court had held that the transfer was within the Attorney General's discretion, under §4082. The Second Circuit remanded for findings on the quality and type of drug rehabilitation facilities at Lewisburg. 557 F.2d at 51.

The same approach applies to mental commitments. In *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975) the Court held that a patient civilly committed to an institution who was no longer receiving any treatment worthy of the term (he got "milieu therapy") was entitled to be released, notwithstanding that there may have been good and sufficient reasons for the original commitment. And in *Vitek* v. *Jones, supra,* the Court acknowledged that confinement in a mental institution imposes deprivations and hardships above and beyond those of normal imprisonment, 445 U.S. at 493 and cases cited. Reading these two cases together it seems safe to say that an inmate committed to a mental institution for treatment must be released back to prison if he is no longer in need of treatment.[7]

State inmates admitted to federal treatment centers should be treated no differently. Once treatment is at an end, the Director does not have authority to re-transfer them to an institution which is not a treatment facility, or

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[7] Return from a federal hospital to prison after termination of treatment is required by statute. 18 U.S.C. §4241.

to reclassify them into a program which does not provide treatment as that word is used in §5003. An inmate received for an operation in a federal prison hospital can not then be retained in federal prison for the rest of his life sentence.

The Congressional authorization was to admit prisoners to treatment facilities. Once the inmate is no longer enrolled in such facilities, the Bureau lacks power to hold him further. 18 U.S.C. §4001(a). If Mr. Howe was ever properly transferred to federal treatment facilities, he is no longer held there for purposes of treatment. The Attorney General must return him to Vermont.

D. The Agency Interpretation Doctrine Is Inapplicable To This Case

Ordinarily the construction of a statute by those who are charged with its execution should be given weight. *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, 719 (1975). The Second Circuit was guided by this principle in taking the language of §5003 "if not quite at face value, at least with the values and construction put upon it by those in the administrative agencies, both federal and state . . . for whom treatment appears as only one of the several goals which may be served by incarceration and only one of the purposes the statute was intended to serve." J.A. 45. See also *Lono* v. *Fenton, supra,* 581 F.2d at 649 (Bauer, J. dissenting).

If Congress meant to accept state prisoners when commodious penal or correctional facilities were available,

the words were there to say it. As the Court wrote in another case of administrative overreaching,

> The idea which is now sought to be read into the grant by Congress to the Administrator . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to do the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Addison v. *Holly Hill Co.*, 322 U.S. 607, 618 (1944).

Terming prisons "treatment facilities" is pure Orwellian newspeak, not English. Even within the Bureau of Prisons this jargon has come to be seen as something of an embarrassment. See *Carlson, supra,* "The First Forty Years." Another writer in the Bureau publication Federal Probation has noted,

> It is an extraordinary feature of the history of the institution of punishment that a contingent, incidental concommitant should in this century have been elevated to the status of prime or essential function. B. Frank, "The American Prison: The End of an Era", 43 Fed. Probation No. 3 p. 3, 6 (Sept. 1979), quoting Morris, Norval and Hawkins, George, "Letter to the President on Crime Control," Chicago, Illinois, University of Chicago Press, 1977, p. 63-64.

More to the point, Congress always avoided the jargon and its use of the phrase in §5003 — if legislative history and its choice of language in prior and subsequent enact-

ments are any guides — was not intended to have a "technical" meaning. As Justice Frankfurter wrote in the *Holly Hill* case,

> To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of the words is quite another.

322 U.S. at 617.

It is unclear when the Bureau started to give §5003 its broadened construction. Judge Bauer in his dissent in *Lono* refers to it as a "settled" practice, but we have been unable to determine if it was ever written down, or when, or at what level. See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-628 (1971) where the administrator "adopted no expressly articulated" position and arguments of the agency's appellate counsel were not agency interpretations. See also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 N.5 (1978) (the weight to be given an agency interpretation depends, in part, on the thoroughness with which it was considered and its consistency over time). Compare *United States* v. *National Association of Securities Dealers*, at 718-719 (agency interpretation found in a published opinion letter and formal staff report); *Saxbe* v. *Bustos*, 419 U.S. 65, 73 n. 25 (1974) (agency regulation stated in written general order). The published regulations, by contrast, retain the "treatment facilities" requirement, and indeed stress it. Among the Director's various enumerated duties is

> Entering into contracts with State or Territorial officials for the custody, care, subsistence, education,

> treatment, and training of State or territorial prisoners, upon certification with respect to the availability of proper and adequate treatment facilities and personnel. . . .

28 C.F.R. §0.95(g)

The Bureeau's regulations masked its practice. The issue did not reach the courts until 1978. When the Government brought Congress a proposed amendment ratifying current practice in 1980, Congress failed to act. It is fanciful to suggest that Congress knew about the practice all the time and that its silence denotes consent. See *Beshaw* v. *Fenton,* slip op. 11-12.

Indeed, the practice of boarding large numbers of state inmates in federal prisons appears to be of relatively recent vintage. In 1974 there were only 45 "state boarded" prisoners in federal facilities. Sourcebook of Criminal Justice Statistics — 1976, U.S. Department of Justice (1977) p. 722. In 1975 the figure was 62. Sourcebook of Criminal Justice Statistics — 1977, U.S. Department of Justice (1978) p. 666. In March, 1980, counsel for one of the prisoners in *Anthony* was informed by the Bureau that the figure was 280. *Girouard* v. *Wilkinson,* Nos. 79-2361 and 79-2410, Brief for Petitioner-Appellee, p. 6 n.2.

We are informed by the Solicitor General's office that as of December 31, 1980, there were 836 state and territorial inmates in federal custody. The data furnished to

us by the government indicate that these transfers are for custody and not therapeutic purposes.[8]

E. Treatment Facilities Can Not Mean "Run-Of-The-Mill" Rehabilitative Programming.

The Second Circuit held that treatment facilities need only be nominally rehabilitative; it was immaterial whether the transferred prisoner actually received (or needed) treatment even in the broad sense of "reform." J.A. 44. In *Anthony* v. *Wilkinson* the Seventh Circuit, faced with mounting opposition to *Lono* and indications that the government had been less than diligent in observing it,[9] looked for a compromise position. *Lono*

[8] The Bureau designates six levels of security, level six being the highest and level one the lowest. The breakdown of state inmates by security level is as follows:

Security Level	Number of Inmates
5 & 6	343
4	179
3	104
2	67
1	34

In addition, 109 state or territorial inmates were held at various "Administrative Facilities."

[9] In its order consolidating the various appeals decided in *Anthony* and fixing a briefing schedule the court wrote as follows:

> The *en banc* decision of this court in *Lono* was filed on July 25, 1978. No Petition for Certiorari was sought by the United States. Now well over a year later this court is faced with *Lono* questions being raised by numerous state prisoners in federal custody in this circuit. We assume that the Department of Justice has not chosen to ignore *Lono* in this circuit. We also inquire generally of government counsel what, if anything, is being done in this circuit to comply with *Lono*.

Anthony et al. v. *Wilkinson et al.*, Order of November 29, 1979, pp. 2-3.

would not be overruled. The legislative history compelled the conclusion "that 'treatment' must be construed as therapeutic or rehabilitative in nature." Treatment, the court wrote is different from mere incarceration. Nevertheless, it can be read broadly to "encompass procedures and conditions which primarily benefit the prisoner individually and not simply society as a whole." Slip op. 17. It need only be something which "directly enhances the well-being of the individual prisoner." Ibid, n. 18. The court justified this retreat from *Lono* on humanitarian grounds:

> The increased availability of programs in the federal system is an improvement upon the conditions under which petitioners would remain incarcerated in the state systems. While the availability of programs alone is no guaranty that the prisoner will participate we find that this amelioration of conditions is likely to benefit the prisoner. Accordingly we perceive a therapeutic benefit which *for these purposes* may be construed as "treatment." Thus, if a sufficient array of programs is provided in connection with incarceration in a maximum security prison, it may be possible to conclude in individual cases under *Lono* that a need for specialized treatment has been demonstrated.

Slip op. 17, court's emphasis

Treatment facilities, the *Anthony* court held, are not merely prisons, but prisons in their rehabilitative aspect. The court seems uncomfortable in this conclusion and justifiably so. Prisons in America are rehabilitative institutions and have been for many years. From its

inception the Bureau espoused rehabilitation as one of its cardinal functions. "Rehabilitation of the prisoner as the primary purpose of incarceration became national public policy in 1929 when the U.S. Congress authorized the creation of a Federal Bureau of Prisons." B. Frank, "The American Prison: The End of an Era," *supra,* 43 Fed. Prob. No. 3 at p. 5. Compare *Carlson, supra,* "The First Forty-Five Years," 39 Fed. Prob. No. 4 at p. 40, promising continued commitment to programs "in which an offender can maximize his potential for change." The meaning of the term, as the *Anthony* opinion recognizes, varies over time and has covered everything from hard labor to psychosurgery and "education." Slip op. 17 n. 19. The court's new test — facilities "which primarily benefit the prisoner individually and not simply society as a whole" — is difficult to apply. Courts will be hard-pressed to make such judgments. Nor is there much to guide a court in determining whether "a sufficient array of programs" has been provided. The crucial issue under the statute is not the number of programs or the general benignity of the incarceration but the *type* of program and its propriety for the individual inmate.

The principal motivation behind the court's holding was the states' asserted lack of suitable long-term maximum security facilities, and the "amelioration of conditions" which a transfer can bring about. We argue below that the states' claims are exaggerated. More importantly, however, Congress did not enact §5003 to "ameliorate conditions" generally, or to provide states with assistance in their custody needs. It acted with a view to treatment needs and a narrow reference to treatment facilities.

In construing a statute, courts are obliged to give effect, if possible, to every word Congress used. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). In the phrase "treatment facilities" the *Anthony* court reads "treatment" to include work programs, educational programs, and recreational programs. Slip op. 16. But included among the items contracted for are "education, treatment, and training." *Anthony's* construction of "treatment" renders "education" and "training" wholly redundant. Even ignoring this redundancy and granting that any rehabilitative program qualifies as treatment in a sense, "treatment facilities" can not denote schools, athletic programs, religious programs, or job training, although all of these things "primarily benefit the prisoner."

Even under the *Anthony* court's test, the petitioner in this case is illegally held. He is no longer a recipient of even "run-of-the-mill" rehabilitative programs, unless knitting and crocheting are to count as rehabilitation. The Second Circuit believed that his transfer was not for rehabilitative purposes. J.A. 42 n.4. The record is clear that the only reason now for his incarceration in Terre Haute is custody. He is no longer held "pursuant to an Act of Congress." 18 U.S.C. §4001(a).

F. Policy Implications

The state complains that it lacks maximum security facilities. In fact, the record shows that it has maximum security facilities in one wing of the St. Albans Facility; it contends that these facilities are cramped and not suited

for long-term prisoners. J.A. 40-41. It presents its case almost as a matter of necessity.

Even without upgrading the security of St. Albans Vermont was able to incarcerate Mr. Howe tolerably well. The District Court found that in St. Albans he did not enjoy the same freedom of movement which he had at Terre Haute and Atlanta. Nevertheless,

> The programs at St. Albans . . . were substantially similar to those at the federal institutions although somewhat less accessible to Howe because of restrictions on his ability to move about the St. Albans Facility. The only two programs in which he actually participated at St. Albans were psychiatric counselling and educational courses but others probably were available to him if he wished.

J.A. 33.

Vermont is a member of the New England Corrections Compact, 28 V.S.A. §§1401-1410. The Compact authorizes the party states to contract with each other "for the confinement of inmates on behalf of a sending state in institutions situated within the receiving states." 28 V.S.A. §1403.[10] Vermont is also a member of the Interstate Corrections Compact, 28 V.S.A. §§1601-1610, which contains an identical grant of authority to contract for the confinement of inmates. 28 V.S.A. §1603(a). If

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[10] Transfers to these neighboring states are of course less onerous than many §5003 transfer in terms of distance from the inmate's home. Indeed Mr. Howe asked at his transfer hearing to be sent to New Hampshire if he was found unsuitable for St. Albans. J.A. 25.

confinement is what the state needs it has these options; there is no need to send inmates to the Bureau of Prisons under the guise of treatment.

Ultimately, of course, the state has the option of upgrading existing facilities or building a new one. Vermont had a maximum security prison, at Windsor, Vermont, and closed it down in 1975 as a result of its agreement with the Bureau of Prisons to transfer up to forty Vermont prisoners to the Bureau without prior approval. J.A. 10, 34, *Rebideau* v. *Stoneman,* 398 F.Supp. 805 (D. Vt. 1975), aff'd 575 F.2d 31 (2d Cir. 1978) (per curiam). An unauthorized arrangement of mutual convenience does not become authorized because it has proved convenient. A statute can not be amended by an administrative *fait accompli.*

In 1916 a United States District Judge wrote as follows:

> While prisoners have no right to receive visits from their family, they are at present universally allowed to do so at certain intervals, both for their own good and for the sake of their family. The transfer of a prisoner, having a wife and young child, from a prison near which they reside, and at which they can visit him, to a distant place of confinement where they may well be unable to go, with the result that they may not see him for 10 or 12 years, obviously imposes on him an additional hardship . . . and additional peril. It may result in the loss of that interest in him by his family and friends which would be maintained if they saw him occasionally, and which furnishes one of his most powerful incentives to reformation and honest living after his discharge.

Keliher v. *Mitchell,* 250 F. 904, 906-907 (D. Mass. 1916) (Morton, J.) (citations omitted).

The Court in *Meachum* v. *Fano* seems to acknowledge that transfers could impose "grievous" loss, holding only that an inmate is not protected against such loss by the due process clause, absent some expectation rooted in law that he will not be transferred. 427 U.S. at 224. See also *Montanye* v. *Haymes, supra,* 427 U.S. at 241 N.4., quoting the Second Circuit's recitation of the hardships involved.

Transfers from one jurisdiction to another carry special hardships.

> Transfer to a foreign jurisdiction has traditionally been regarded as altogether different [from transfers within a jurisdiction]: to be cast outside the jurisdiction within which one was sentenced is often to be separated from rights and privileges and standards otherwise available — to become, to some degree, a "man without a country."

Gomes v. *Travisono,* 490 F.2d 1209, 1217 (1st Cir. 1973) (Campbell, J. concurring), vacated and remanded. sub nom. *Travisono* v. *Gomes,* 418 U.S. 909 (1974)

In *Tai* v. *Thompson,* 387 F.Supp. 912, 915-916 (D. Hawaii 1975) the court wrote that a §5003 transfer from Hawaii to Atlanta

> is a different matter from a mere transfer across state lines. The isolation of the prisoner — his inability to receive the help of his counsel, friends, family in Hawaii — amounts to a loss of liberty similar to placing him in solitary confinement.

In a footnote the court remarked that this kind of isolation lasts a lot longer. Id. n. 20. And in *Capitan* v. *Cupp,*

356 F.Supp. 302, 303 (D. Ore. 1972), a §5003 transfer from Oregon State Penitentiary to Leavenworth, the court wrote:

> I am satisfied that the transfer of a prisoner from a state institution to a federal prison 2,000 miles from his family and his home is a "grievous loss" which requires the imposition of some procedural safeguards.

See also *Hoitt* v. *Vitek*, 361 F.Supp. 1238 (D.N.H. 1973), aff'd. 495 F.2d 219, 497 F.2d 598 (1974), noting a number of adverse effects of long distance transfers; *Croom* v. *Manson*, 367 F.Supp. 586, 590 (D. Conn. 1973), stressing the lack of family and counsel visits.

The harm is not only to the inmate but to society as a whole. A psychiatrist in *Hoitt* v. *Vitek* testified that these transfers have a detrimental effect on the inmate's rehabilitation; "transfer can never be beneficial to the transferred inmate, even if the conditions of confinement at the receiving institution are better than those existing at the institution from which he was sent." Transfer of an inmate away from his community "is destructive of the positive reinforcement an inmate receives from family and friends. . . ." 361 F.Supp. at 1249-1250. This is not simply one doctor's opinion. We are advised that the Bureau attempts to place federal inmates in institutions near their home communities. The new Community Treatment Centers are also a step in this direction. The need to integrate the inmate with the community is the basic message of the 1967 Task Force Report on Correction:

> The task of corrections therefore includes rebuilding solid ties between offender and community, inte-

> grating or reintegrating the offender into community life — restoring family ties, obtaining employment and education, securing in the larger sense a place for the offender in the routine functioning of society.
>
> President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections (1967) p. 8.

Implications of this view are community-based programs and liberal visiting.[11] Id. pp. 9-10, 56-57.

Considerations such as these could well have motivated Congress to limit the states' ability to transfer prisoners to cases of specialized treatment needs, even if the Bureau's prisons were better than what the states provided and even though the arrangement might be cost-efficient for the Bureau and the states.

The mushrooming population of state and territorial prisoners in federal prisons raises another serious policy consideration. Judge Wood, the author of the *Lono* opinion, wrote a brief concurring opinion on this point in *Anthony:*

> If a national prison system instead of a federal prison system is to be enacted, it should be accomplished by the Congress and not the court. I do not believe it

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[11] Chief Justice Burger in his recent speech to the American Bar Association also called for policies permitting "[g]enerous family visitation in decent surroundings to maintain family ties. . . ." Annual Report to the American Bar Association (Houston, Texas, February 8, 1981) p. 10.

> is up to judges to provide the states with an unlegislated method merely to permit them to avoid one of their most troublesome local responsibilities. States should be expected to take care of their own except within the limitations of the present statute until such time as Congress makes it clear that the Bureau of Prisons is authorized generally to go into the rent-a-prison business.

Slip op. 33

Judge Wood considered the business would be successful, given the Bureau's desservedly high reputation. If that is what Congress now intends, it will say so in plain language.

CONCLUSION

For the above-stated reasons the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, SR.,

Petitioner,

— v. —

WILLIAM FRENCH SMITH,
ATTORNEY GENERAL OF THE UNITED STATES,

NORMAN CARLSON,
DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS,

AND

WILLIAM CIUROS, JR.,
COMMISSIONER OF CORRECTIONS, STATE OF VERMONT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT CIUROS

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QUESTION PRESENTED

Whether the authority of the Federal Bureau of Prisons to receive state prisoners into federal penal or correctional institutions is limited by statute to cases where appropriate treatment facilities and personnel are available in the federal prison system for inmates with specialized treatment needs.

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BRIEF FOR RESPONDENT CIUROS

OPINIONS BELOW

The opinion of the United States District Court for the District of Vermont (J.A. 31-37) is reported at 480 F. Supp. 111 (1979). The opinion of the United States Court of Appeals for the Second Circuit (J.A. 38-45) is reported at 625 F.2d 454 (1980).

JURISDICTION

The judgment of the Court of Appeals (J.A. 46-47) was entered on June 23, 1980. A petition for a writ of certiorari was timely filed by mailing on September 11, 1980 and docketed in the Supreme Court on September 15, 1980. Certiorari was granted on January 26, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §5003, "Custody of State offenders," reads as follows:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.
>
> (b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.
>
> (c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.
>
> (d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

STATEMENT OF THE CASE

In December, 1974, Vermont, having determined its 166 year old maximum security prison to be woefully inadequate, announced that it would close the facility by June 30, 1975.[1] With the closing of that facility, Vermont would have neither a long-term maximum security facility, nor the capability to provide long-term treatment and programs within an institutional setting. To provide for the small number of prisoners who require maximum security confinement or require rehabilitative treatment and programs not available within the state, Vermont and the Government of the United States, in February, 1975, entered into an agreement under which terms the United States certified that it had facilities available and agreed to accept into the Federal Bureau of Prisons up to forty Vermont prisoners. (Joint Appendix page 10.)

On December 13, 1976, petitioner was convicted of first degree murder and on February 2, 1977, he was sentenced to a term of life imprisonment. He was given credit toward service of his term for the 21 months and 31 days spent in custody prior to sentencing. (Joint Appendix page 21.)

On February 16, 1977, petitioner was notified that the Classification Committee was recommending he be transferred out of state. He was informed of the recommendation and of the reason for that recommendation. He was advised that there would be an administrative hearing at 1:00 P.M. on February 22, 1977, to consider that recommendation and that he had the right to be present at the hearing, to give testimony, call witnesses, present documentary evidence and to be represented by lay counsel of his choice. (Joint Appendix pages 27–29.)

The hearing was held on February 22, 1977. Evidence presented to the hearing officer indicated that petitioner was "highly resistant to treatment", that "therapeutic intervention

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[1]The circumstances surrounding the decision to close the archaic prison are set forth in *Rebideau v. Stoneman*, 398 F. Supp. 805 (D. Vt. 1975), *aff'd* 575 F.2d 31 (2d Cir. 1978) (per curiam).

would be close to impossible", that petitioner was "a most dangerous person who could well repeat the same pattern of assaultive behavior toward women at any time in the future", and that he was an escape risk who, in fact, had escaped from Vermont's most secure wing while in pre-trial detention status. (Joint Appendix pages 21–26.)

The hearing officer's report was forwarded to the Commissioner of Corrections. On March 9, 1977, the Commissioner directed that petitioner be transferred to the Federal Bureau of Prisons. (Joint Appendix pages 19–20.) The Commissioner's determination (Joint Appendix page 19) was based on the findings of the hearing officer that the Vermont Department of Corrections could not provide the required degree of security and that the specific program needs of petitioner could not be provided by the Vermont Department of Corrections in a maximum security setting. (Joint Appendix pages 25–26.)

Based on personal visits to at least five federal facilities, on general knowledge of the bureau and its operation, and from yearly reports published by the bureau, the Commissioner was familiar with the programs available in the Federal Bureau of Prisons. (Trial transcript pages 17–18.) The Commissioner knew that the bureau had the capacity to offer the widest range of programs within a maximum security setting, and that the Vermont Department of Corrections did not have that capacity. (Trial transcript page 19.) Additionally, the Commissioner knew that under the terms of the agreement between the Government of the United States and the State of Vermont, the Bureau of Prisons would provide a full range of programs for those state prisoners transferred to it. (Trial transcript page 29.) Accordingly, the Commissioner, having determined that the Vermont Department of Corrections did not have the capacity to offer plaintiff treatment and programs within the required degree of security, directed petitioner's transfer to the Federal Bureau of Prisons.

Subsequent to the decision of the United States Court of Ap-

peals for the Seventh Circuit in *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978), petitioner brought this action. His claim, in substance, is that since the Director of the Bureau of Prisons had made no pretransfer determination that the bureau had specialized treatment programs available for petitioner which were not available within the Vermont Department of Corrections, petitioner's confinement in a federal institution was contrary to the requirements of 18 U.S.C. §5003 and, hence, unlawful. Accordingly, he sought return to the State of Vermont. (Joint Appendix pages 3–5.)

In its decision, the United States District Court for the District of Vermont held that 18 U.S.C. §5003 plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with the contract under which petitioner was transferred. The Court found 18 U.S.C. §5003 to require nothing more of the Director than a certification that facilities exist within the federal system in which state prisoners may be accommodated. *Howe v. Civiletti,* 480 F. Supp. 111, 115 (D. Vt. 1979). (Joint Appendix page 37.)

On appeal, the United States Court of Appeals for the Second Circuit held that 18 U.S.C. §5003 authorizes states to contract not simply for "treatment" but the "custody, care, subsistence, education treatment, and training of persons convicted".

> Nothing in this grammatical construction gives "treatment" the primacy which Howe contends for, or provides a basis for concluding that, whatever other services are provided, treatment must in all events be furnished prisoners subject to any federal-state contract authorized by the statute.

Howe v. Civiletti, 625 F.2d 454, 457 (1980.) (Joint Appendix page 44.) The Court of Appeals affirmed the Order of the District Court denying petitioner relief.

SUMMARY OF THE ARGUMENT

18 U.S.C. §5003(a) provides authority for the Federal Bureau of Prisons to contract with state officials for the "custody, care, subsistence, education, treatment and training" of state prisoners provided the Director certifies that proper and adequate treatment facilities and personnel are available. The plain language of the statute reposes discretion in federal officials to accept the transfer of state inmates. The only limitations imposed by Congress on the Director are that there be space available to house the inmate and personnel to care for him as well as insuring that the sending state would reimburse the federal government for the custody and care of the state inmate.

Applying the rationale used in arguments advanced for a restrictive construction of 18 U.S.C. §5003(a) to similar provisions in the United States Code relating to Prisons and Prisoners (Part III, Title 18, United States Code) would create in the prisoner due process entitlements in decisions respecting designation and redesignation of place of confinement as well as classification decisions. Federal courts, however, have rejected arguments that inmates have a liberty or property interest in these decisions.

A restrictive construction of section 5003(a) would not only offend the plain language of that section but also would sap all meaning and vitality from section 5003(c). Section 5003(c) provides that state inmates transferred to the federal system are subject to the same laws and regulations applicable to the federal prisoners.

Statutes should not be interpreted so as to yield absurd results. A narrow construction of §5003(a), however, would either result in a transfer for specialized treatment which thereafter does not have to be rendered, or voids section 5003(c) completely.

The legislative history of section 5003 supports the interpretation given it by the Second Circuit. The House Report

itself stated the purpose was to permit transfers when "federal facilities" are available. Support for a restrictive interpretation of section 5003(a) can be found only by reading one passage of the legislative history, and that out of context.

Further, the administrative interpretation given section 5003(a) by the Bureau of Prisons, the agency charged with its administration, for the 29 years since that statute's enactment is entitled to deference. Indeed, if Congress were at odds with the interpretation given section 5003 by the bureau it so could have indicated in its 1965 amendments to that statute. The legislative history of the amendment supports the interpretation given section 5003 by the Second Circuit.

The administrative procedures given petitioner prior to his transfer to the federal system, procedures developed on guidance from the federal courts, more than satisfied any interest embodied in section 5003.

The question presented this Court is one of statutory construction. Policy arguments raised by petitioner should be directed to the Congress. Constitutional claims interjected by *amicus curiae* should be presented first to a trial court.

ARGUMENT

I.
18 U.S.C. §5003 DOES NOT REQUIRE A PRIOR FINDING THAT SPECIALIZED TREATMENT IS UNAVAILABLE IN THE STATE

A narrow issue before this Honorable Court is whether the transfer of a state prisoner to federal custody, pursuant to 18 U.S.C. §5003, must be preceded by a determination that "specialized treatment" is unavailable in the state system.

For reasons which follow, the State of Vermont contends that it does not.

A.

18 U.S.C. §5003 MERELY REPOSES FULL DISCRETION IN FEDERAL PRISON OFFICIALS TO ACCEPT CUSTODY OF STATE INMATES

Section 5003, on its face, does not require a determination that specialized treatment is unavailable. Rather, it merely requires federal prison officials to "certify that proper and adequate treatment facilities and personnel are available." The debate in the various District Courts and Circuit Courts of Appeals has turned on whether this phrase merely requires that there be sufficient space to house, and staff to care for, a state prisoner, or rather, whether it requires a showing, in each individual case, of specialized treatment needs of the state prisoner which cannot be met by the state but for which treatment is available in the federal system.

In the matter now before this Court the United States District Court for the District of Vermont held:

> [T]he act plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with [§5003]. . . . In contracting with state officials, 18 U.S.C. §5003(a) requires nothing more of the Director of the Bureau of Prisons than a certification that facilities exist within the federal system in which state prisoners may be accommodated. That requirement has been met in the case at hand.

Howe v. Civiletti, 480 F. Supp. 111, 115 (D. Vt. 1979), *aff'd* F.2d 454 (2d Cir. 1980). On review the United States Court of Appeals for the Second Circuit affirmed the District Court's order holding:

> The statute authorizes states to contract not simply for "treatment", but the "custody, care, subsistence, education, treatment and training of persons convicted". Nothing in this grammatical construction gives "treatment" the primacy which Howe contends for, or provides a basis for concluding

> that, whatever other services are provided, treatment must in all events be furnished prisoners subject to any federal-state contract authorized by the statute.

Howe v. Civiletti, 625 F.2d 454, 457 (2d Cir. 1980).

In *Sisbarro v. Warden,* 592 F.2d 1 (1st Cir.), *cert. denied,* 444 U.S. 849 (1979), the court explicitly rejected a restrictive construction of section 5003(a) apparently because it reads that section as reposing discretion in prison officials which is not ordinarily the subject of judicial review:

> This provision [§5003] "merely authorizes the federal government to make arrangements with a state whereby a state's prisoners may be confined when the state feels that either it or the prisoner may benefit from the arrangement". (Citations omitted).

Sisbarro, supra, 592 F.2d at 4.

In *Beshaw v. Fenton,* ____F.2d____, No. 79-1777 (3d Cir. Dec. 15, 1980), *petition for cert. filed,* March, 1981, the Third Circuit, faced with precisely the same issue and factual setting as this case, held:

> We find that the language of Section 5003, construed in the light of the legislative history of the provision, is best understood as not requiring a showing of need for specialized treatment before a transfer from state to federal custody may be authorized. The statute provides that the Attorney General can contract with appropriate representatives of the States "for the custody, care, subsistence, education, treatment and training" of convicted persons. The purposes of the statute appear to include care, custody, subsistence, education and training as well as treatment, and we do not believe that this statutory language can be fairly read as requiring that any one of these purposes must be applicable to every case. While Section 5003 also states that transfers can take place only when the Director of the Bureau of Prisons certifies that "proper and adequate treatment facilities and personnel are available", we doubt that this clause can be in-

> terpreted as requiring any more than that federal facilities and personnel be adequate to handle any prisoners received; we do not find that it places a substantial restriction on the purposes for which prisoners may be transferred.

Beshaw, supra, Slip opinion at 9.

The United States Court of Appeals for the Tenth Circuit recently concluded that there is no basis in the language of the statute for a narrow reading of section 5003(a). It held that contracts not only for treatment, but also for custody, care, subsistence, education and training of convicted persons are authorized. *Fletcher v. Warden,* ____F.2d____, Docket No. 79-1156, et al. (10th Cir. Feb. 13, 1981).

In *United States ex rel Gereau v. Henderson,* 526 F.2d 889 (5th Cir. 1976), the court observed that section 5003:

> [M]erely authorizes the federal government to make arrangements with a state whereby a state's prisoners may be confined in a federal institution when the state feels that either it or the prisoner may benefit from such an arrangement.

Id. at 884.

The United States Court of Appeals for the Seventh Circuit, in a panel decision, held:

> there is simply nothing in the language of the statute itself that restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment.

Lono v. Fenton, slip op., at 5. 23 C.L.R. 2018 (7th Cir. 21 Feb. 1978).

That panel decision, however, was subsequently reversed by a 4–3 decision of the Seventh Circuit sitting *en banc. Lono v. Fenton,* 581 F.2d 645 (7th Cir. 1978). In *Lono* the majority found the term "treatment facilities" to be unique. The Court observed that elsewhere the statutes relating to the federal prison system refer to the facilities as "penal and correctional institutions" and not "treatment facilities". The Seventh Circuit,

reading §5003 as emphasizing "treatment facilities", held that it necessarily follows that the only authorized purpose for any transfer is the provision of specialized treatment.

Vermont maintains, however, that the language used by Congress is not so "unique" as to compel the restrictive construction given §5003 by the Seventh Circuit. Rather, functionally identical federal statutes, containing various terms to refer to a penal institution, have been uniformly construed by the courts as reposing complete discretion in prison officials to transfer inmates without affording due process protections.

For example, 18 U.S.C. §4042 requires, *inter alia,* that "suitable quarters" be provided all federal inmates:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> * * *
>
> (2) provide suitable quarters and provide the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise. . . .

18 U.S.C. §4082(b) provides that any transfer of a federal prisoner must be to an "available, suitable, and appropriate institution or facility":

> The Attorney General may designate as a place of confinement *any available, suitable, and appropriate institution or facility,* whether maintained by the Federal Government, or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another. (Emphasis added).

If the restrictive construction of section 5003(a) controlled, inmates confined in the Federal Bureau of Prisons would have an expectation not to be moved to another institution unless it is first determined to be "available, suitable, and appropriate".

However, in *Walker v. Hughes,* 558 F.2d 1247, 1252–1253 (6th Cir. 1977), the court held that 18 U.S.C. §§4042 and

4082(b) do not create a liberty interest in federal prisoners, but rather "gives federal prison officials full discretion" to transfer inmates:

> Federal statutory law gives federal prison officials *full discretion in the treatment of prisoners* and does not restrict the authority of prison officials over the inmates as to placement in more restrictive living status, transfer to other prisons, subjection to significant and adverse effects on parole dates, and deprivation of privileges. Under 18 U.S.C. §4042, the Bureau of Prisons is invested with the responsibility of management and regulation of the federal prison system. Under 18 U.S.C. §4082(b), the Attorney General has the authority to transfer a prisoner from one penal institution to another at any time. (Emphasis added).

Other courts also have held that the Attorney General, pursuant to 18 U.S.C. §4082, has the unfettered discretion to transfer a prisoner from one place of confinement to another at any time, *Buckley v. United States,* 494 F. Supp. 1000, 1002 (E.D. Ky. 1980); and for any reason whatsoever or for no reason at all. *Robinson v. Benson,* 570 F.2d 920, 923 (10th Cir. 1978).

In *United States ex rel. Gereau v. Henderson,* 526 F.2d 889 (5th Cir. 1976), the court observed:

> This review . . . persuades us that, even though a serious disadvantage may accompany even an administrative transfer, the practical necessities of prison administration require that the *administrative* decision to transfer an inmate remain within the sound discretion of prison authorities. . . . A non-disciplinary transfer is closely akin to the initial determination of the place and specific facility for confinement which, in the federal system, is almost wholly confided in the Attorney General. 18 U.S.C. §4082.

Id. at 896–897.

Similarly, in *McDonnell v. United States Atty. Gen.,* 420 F. Supp. 217 (E.D. Ill. 1976), the court held that 18 U.S.C.

§4082(b) does not create "an expectation that no transfer will occur except upon proof of misconduct or other specified events" (*Id.* at 220).

In like vein, 18 U.S.C. §4081 requires that federal prisoners be classified in prisons, in light of their offenses, characters, and mental conditions, so as to provide them appropriate treatment:

> *Classification and Treatment of Prisoners*
>
> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care and treatment of the persons committed to such institutions.

If the *Lono* rationale is applied to this statute, federal prisoners would have an interest in classification and programming decisions. Yet, the United States Supreme Court held that 18 U.S.C. §4081 merely reposes *discretion* in prison officials and not a reasonable liberty interest in prisoners:

> In *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451, for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where the transfer visited a "grievous loss" upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. *Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U.S.C. §4081, and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.* (Emphasis added).

Moody v. Daggett, 429 U.S. 78, 88, n.9 (1976).

In *Curry-Bey v. Jackson,* 422 F. Supp. 926, 932 (D. D.C. 1976), the court held that the transfer of District of Columbia

inmates to federal custody was wholly "committed to" the discretion of prison officials:

> Regardless of the wisdom of such transfers, which often uproot the inmate and separate him from the rehabilitative influence of home and family, the decision to transfer or not is within the discretion of prison officials and is not subject to due process requirements of notice and hearing.

18 U.S.C. §5012 of the Youth Corrections Act provides:

> No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided.

Applying the *Lono* rationale to §5012, the only authorized purpose for commitment of youthful offenders under the Youth Corrections Act would be for the provision of specialized treatment. Commitment would have to be preceded by a determination of need and availability.

In *Robinson v. United States,* 474 F.2d 1085 (10th Cir. 1973) appellant argued that his sentence was illegal for failure to comply with the requirements of 18 U.S.C. §5012. There had been no certification from the Director of the Bureau of Prisons that proper and adequate treatment facilities were provided for him.

The *Robinson* court rejected that construction of §5012, holding that the certification provision was concerned with the starting point for the use of the Act.

> §5012 does not say that a certificate must be submitted to the trial court in every case where a youth offender is up for sentencing and we feel such an interpretation would be unreasonable. . . . This is not to say the statute requires the Government to furnish a certification to the sentencing court on the availability of facilities and personnel in every youth offender case and we decline to make such an interpretation.

Robinson, supra at 1091. As stated by another court, requiring certification of space before sentencing to the custody of the At-

torney General would be unnecessary and improper. *U.S. v. Lowery,* 335 F. Supp. 519 (D. D.C. 1971).

Except for those within the Seventh Circuit, where District Courts are constrained to follow the *Lono* reasoning, District Courts have almost uniformly rejected[2] the narrow reading of section 5003 in favor of a construction of the statute as reposing discretion in the federal officials to accept state prisoners if space is available. *Bowers v. Fenton,* 488 F. Supp. 570 (M.D. Pa. 1979); *Gomes v. Moran,* 468 F. Supp. 542 (D. R.I. 1979); *Fletcher v. Warden,* 467 F. Supp. 777 (D. Kan. 1979); *Shakur v. Bell,* 447 F. Supp. 958 (S.D. N.Y. 1978). *Accord, Goodnow v. Perrin,* ____N.H.____, 421 A.2d 1008 (1980).

B.

SECTION 5003(a) CANNOT BE INTERPRETED TO RESTRICT THE BUREAU OF PRISONS TO ONLY ACCEPTING STATE PRISONERS IN NEED OF SPECIAL TREATMENT SINCE SECTION 5003(c) AND THE RELATED STATUTORY SCHEME PERMIT THE BUREAU TO DENY STATE PRISONERS ACCESS TO TREATMENT PROGRAMS

When §5003(a) is considered in conjunction with §5003(c), it becomes clear that the section does not restrict the purposes for which the Bureau of Prisons can accept state prisoners.

Section 5003(c) provides, with certain exceptions not applicable here, that all state prisoners in federal custody shall be subject to the statutory and regulatory scheme governing the Bureau of Prisons. Specifically, that subsection provides:

> (c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall

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[2]In *Ali v. Gibson,* 483 F. Supp. 1102 (D. V.I. 1979), the court, *in dicta,* noted the split in authority and indicated a preference for the *Lono* holding. Counsel has found no other reported case, by a court from outside the Seventh Circuit, adopting the *Lono* interpretation.

be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

Once it is concluded that state prisoners are subject to the federal scheme, it necessarily follows that they have no entitlement to receive any form of "treatment" after they are in the federal system. Federal prison officials are statutorily vested with full discretion to determine which inmates have access to rehabilitation programs. No inmate has an entitlement to participate in such programs. In *Moody, supra,* the Supreme Court observed:

> Petitioner also argues that the pending warrant and detainer adversely affect his prison classification and qualification for institutional programs. We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right. In Meachum v. Fano . . . for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where that transfer visited a 'grievous loss' upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. *Congress has given federal prison officials full discretion to control these conditions of confinement,* 18 USC §4081 [18 USCS §4081], *and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.* (Emphasis added).

429 U.S. at 88, n. 9. Thus, "[f]ederal statutory law gives federal prison officials full discretion in the treatment of prisoners." *Walker, supra,* 558 F.2d at 1252. Classification and placement of a state prisoner in the federal system, under 18 U.S.C. §5003(c), ordinarily lies within the virtually unreviewable discretion of the Bureau of Prisons. *Roe v. United States Attorney,* 489 F. Supp. 4, 6 (E.D. N.Y. 1979). *See Cofone v. Manson,* 594 F.2d 934, 936, n. 1 (2d Cir. 1979).

Since §5003(c) makes the state prisoners subject to this same statutory scheme, they too have no entitlement to participate in treatment programs. Federal prison officials are therefore free to deny the state prisoners access to treatment programs for any number of reasons or for no reason at all. *See Meachum, supra; Moody, supra.*

Given this undeniable conclusion, it is readily apparent that the *Lono* majority's interpretation of part (a) of §5003 is erroneous. Vermont respectfully urges that it makes no sense to interpret §5003 as permitting the Bureau to accept only state prisoners who are in need of special treatment when, by the terms of the same and related statutes, it is free to deny the state prisoners access to treatment programs once they are in federal custody.

It is axiomatic that statutes will not be interpreted so as to yield absurd results. *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978); *Commissioner v. Brown,* 380 U.S. 563 (1965). Similarly, §5003(a)—as interpreted by the *Lono* majority—becomes meaningless in light of §5003(c) and the related statutory scheme. It is also a cardinal rule of statutory construction that such constructions are to be avoided. *Colautti v. Franklin,* 439 U.S. 379 (1979). The Supreme Court's task in interpreting separate provisions of a single act is to give the act the most harmonious, comprehensive meaning possible in light of legislative policy and purpose.[3] *Weinberger v. Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609 (1973). It is necessary to look at the whole law and not be guided by a single segment in properly construing a statute. *Horton v. Califano,* 472 F. Supp. 339 (W.D. Va. 1979).

Because of §5003(c) and the statutory scheme governing the Bureau of Prisons, the only interpretation of §5003(a) logically consistent with §5003(c) and the controlling statutory scheme is that it does not restrict the Bureau's authority to accept state prisoners to those who are in need of special treatment.

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[3]Arguments on legislative purpose appear at IC, beginning at page 18, *infra.*

C.
THE LEGISLATIVE HISTORY OF 18 U.S.C. §5003 INDICATES THAT CONGRESS DID NOT INTEND TO LIMIT THE DISCRETION OF THE FEDERAL BUREAU OF PRISONS TO RECEIVE STATE INMATES

As a necessary preface to this part of respondent's argument, he first points out that under the most elemental concepts of statutory construction resort to legislative history must presuppose an ambiguity in the language of the statute itself.

The Circuit Court in *Howe, supra; Beshaw, supra; Fletcher, supra;* and *Lono, supra,* each rested its decision construing section 5003(a) on the language of the statute itself. Then each court subsequently resorted to legislative history to find support for its construction.

For the reasons which follow, respondent respectfully suggests that if it is necessary to resort to legislative history, the history can support only an interpretation of section 5003(a) as reposing discretion in the federal officials to receive state prisoners.

In its decision, the court in *Lono, supra,* relied heavily upon an August 31, 1951 letter from Deputy Attorney General Peyton Ford to Senator Pat McCarran, chairman of the Senate Judiciary Committee. However, *Lono*'s reference to the third paragraph[4] of that letter neglected the more telling fourth paragraph. The fourth paragraph indicates that the receipt of state prisoners should not be restricted, provided the federal government receives reimbursement from the transferring state:

> There is no apparent reason why the Federal facilities and personnel, if available, should not be made available for

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[4]The third paragraph, set forth in *Lono* at 647, reads: "Frequently, state officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but not available to the states—these requests usually relate to juveniles, concerning whom many of the states are without satisfactory institutions and training programs."

> State offenders, provided, of course, that the Federal Government is reimbursed for any expenses involved.

S. Rep. No. 978, 82 Cong., 1st. Sess. 2 (1951).

Senator McCarran similarly described the purpose of §5003 as providing a "reciprocal arrangement" for prisoner transfers between the states and the federal government:

> This bill would authorize a more or less reciprocal arrangement whereby, under certain conditions in a limited category of cases, at no expense to the Federal Government, the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws.

97 Cong. Rec. 13543 (1951). The limitations referred to by Senator McCarran and Deputy Attorney General Ford were obviously whether federal prison space is available, and, if so, whether the transferring state would reimburse the federal government.

Lono's interpretation of the legislative history of §5003 was challenged by Circuit Judge Bauer in dissent:

> The majority opinion strains to find such language in the requirement that the Director of the Bureau of Prisons certify that "proper and adequate treatment facilities and personnel" be available. That certification requirement, however, speaks only to the necessity for determining whether appropriate facilities and personnel would be available for handling any prisoners received and cannot reasonably be construed as placing a substantive limitation or restriction on the purpose for which prisoners may be transferred.

Lono, supra at 649. The *Lono* majority also read the legislative history as allowing the "use by state prisoners of specialized programs, not available within the state prison system", citing H.R. Re. No. 1663, 82d Cong., 2d Sess. 1 (1952). *Id.* at 647. However, the House Committee language, relied upon by the court, merely explained the *need* for a statute like §5003 and did not in-

tend to create a substantive restriction on the receipt of state prisoners by the federal government.

The court in *Bowers v. Fenton,* 488 F. Supp. 570 (M.D. Pa. 1979), thought the *Lono* majority placed too much emphasis on one passage of the House Report.

> The *Lono* majority made much of a passage contained under the subheading "Contents of Bill" which, if read in isolation, supports the petitioners:
>
> > The proposed legislation restricts or limits the use of federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act. . . .
>
> This single paragraph, however, cannot be dispositive. In order for it to negate the broad language of the statute and the "Statement" it would have to address the alleged limitation in the "Contents" more specifically and directly.

Bowers, supra at 573.

One stated purpose of §5003 is to ensure equal treatment of all prisoners:

> Uniformity in the treatment of all inmates is a very important element in the custodial administration of prisons; and all prisoners, when possible, should be treated alike in order that there be no favored inmates or group of inmates.

H.R. Re. No. 1663, 82d Cong., 2d Sess. 1 (1952), reprinted in (1952) U.S. Code Cong. & Admin. News, 1420–1422.

According to the House Report, the term "treatment" in this Bill, "in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act. . . ." *Id.* The definition of "treatment" in the Youth Corrections Act includes "correcting . . . antisocial tendencies". 18 U.S.C.

§5006(f). Thus, the term treatment can cover a wide range of penal endeavors that are not necessarily "specialized", but instead are rather commonplace in the modern field of corrections.

In re-examining its holding in *Lono, supra,* the Seventh Circuit recognized that treatment was intended to have a broad connotation.

> The Supreme Court has stated that the range of permissible "treatment" under the Youth Corrections Act is broad. *See Dorszynski v. United States,* 418 U.S. 424, 434 (1972). Thus, under the Act "treatment" has been construed to range from probation to maximum security incarceration. *Compare United States v. Glasgow,* 389 F. Supp. 217, 221 (D. D.C. 1975), *with Brown v. Carlson,* 431 F. Supp. at 773 (dicta). In addition, we think that the reference to "correcting . . . antisocial tendencies" in §5006(f) demonstrates that "treatment" is to be given a broader definition than just medical treatment, the limitation which petitioners would have us adopt.
>
> . . . Another section of the Youth Corrections Act also supports our conclusion that "treatment" may be construed to include maximum security incarceration accompanied by participation in "run-of-the-mill" programs. 18 U.S.C. §5011, which is captioned "Treatment," provides that "[c]ommitted youth offenders . . . shall undergo treatment in institutions of maximum security, medium security, or minimum security types. . . ." Based on these provisions, at least, Congress did not intend that maximum security incarceration and "treatment" were to be deemed mutually exclusive. Section 5011, read in conjunction with §5006(f), indicates that "treatment" may be construed to comprehend that kind of maximum security incarceration which provides an improvement in conditions and offers the greatest administratively feasible freedom of movement and access to programs.

Anthony, et al. v. Wilkinson, et al., ____F.2d____, Docket Nos. 79-2362, et al. (7th Cir. Dec. 23, 1980), *petition for cert. filed sub nom, Hawaii, et al. v. Mederios, et al.* (February, 1981). While recognizing that "treatment" is to be construed as running the whole range of penological purposes and functions, the Seventh Circuit, in *Anthony, supra,* continued to believe that a pretransfer determination is required.

The use of the word "correctional" (e.g. Federal Correctional Institution) appears to implicitly recognize that the Bureau of Prisons is designed not merely for punishment, but also for treatment. It follows that "treatment" was intended to be a general, not a specific term, the implementation of which was to be vested in the sound discretion of the Bureau of Prisons.

Indeed, the House Report expressly states:

> The purpose of the proposed legislation is to authorize the Attorney General, *when Federal facilities are available,* to contract with State and Territorial officials for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such States and Territories. (Emphasis added).

Id. at 1420.

There is nothing in the stated purpose which indicates that the term treatment was to have special significance. Rather, the proviso goes to the availability of federal facilities.

Further, with respect to Senator McCarran's comments that the bill was designed to provide a reciprocal arrangement, the House Report states:

> State prisons for many years housed and cared for Federal prisoners—until the Federal Government built its own institutions. Today, by statute, (sec. 4002, title 18, U.S.C.) the Attorney General is authorized to contract with State officials for the care and custody of our Federal prisoners. Pursuant to this authority, there were on August 31, 1951, approximately 3,000 Federal prisoners serving

> short sentences or awaiting trial in State, county and Federal institutions. The committee sees no reason why Federal facilities and personnel should not, in turn, be made available for State offenders, provided, of course, the Federal Government is reimbursed for any expenses involved. The instant bill makes provision for the payment for the use of Federal facilities and for attendant treatment and services rendered by Federal personnel. In this connection, the Senate, by amendment, has expressly provided that the Attorney General's contracts shall provide for "reimbursing the United States in full for all costs and other expenses involved."

Id. at 1421.

In *Beshaw, supra,* the Third Circuit summarized the legislative history arguments as follows:

> Beshaw points to the following language of the House Report as evidencing an intent to restrict the scope of Section 5003: "The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." H.R. Rep. No. 1663, *supra,* at 2.
>
> While this passage would appear facially to support Beshaw's interpretation of Section 5003, we do not find it controlling. The House Report was published on March 27, 1952, five months after Section 5003 had already been passed by the Senate. *See* 97 Cong. Rec. 13543 (Oct. 19, 1951). No language similar to that which appears in the House Report is contained in the Senate Report. We believe that the more restrictive view of the bill represented by the quoted portion of the House Report cannot override the language of the statute itself as enacted by both Houses of Congress—language that authorizes transfers not merely for treatment, but for "custody, care, subsistence, education, treatment, and training."

Id. slip opinion at 10, 11.

Therefore, a careful analysis of the legislative history of section 5003(a) fails to yield support for the conclusion that state to federal transfers must be preceded by a determination of specialized treatment needs available in the state.

D.
THE ADMINISTRATIVE INTERPRETATION OF 18 U.S.C. §5003 BY THE FEDERAL BUREAU OF PRISONS MUST BE GIVEN GREAT DEFERENCE

It is well-settled that the contemporaneous construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight and to the force and effect of law such that courts generally will not depart from such construction unless it is clearly erroneous. *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973) ("[A] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the Courts").[5]

In *Clardy v. Levi*, 545 F.2d 1241, 1245 (9th Cir. 1976), the court indicated that Congress' inaction in the face of the Federal Bureau of Prisons' firm belief that it was not governed by the APA constituted an acquiescence in that position.

Faced with a similar issue, the United States Supreme Court, in *United States v. City of Chicago*, 400 U.S. 8, 10 (1970), declined to second-guess the definition of a statutory term of the administrative agency charged with its interpretation; indeed, the court chose to "defer on this issue to the definition of 'train' given by the administrative agency which has oversight of the problem."

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[5] *Accord, Trafficant v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) ("Such construction is entitled to great weight."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–434 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Brubaker v. Morton*, 500 F.2d 200, 202 (9th Circ. 1974) ("A court faced with a problem of statutory construction should give great deference to the interpretation of a statute by the officers or agency charged with its administration.").

That case has particular efficacy herein because the recent body of correctional law, notably cases rendered by the United States Supreme Court, shows that even greater deference is given to discretionary choices made by prison officials regarding the placement of inmates. *See, Wolff v. McDonnell,* 418 U.S. 539, 566–567 (1974) (prison officials "must have the necessary discretion without unduly crippling constitutional impediments.") *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). (Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices. . . .)

The interpretation given §5003 by the Federal Bureau of Prisons over the years is therefore quite relevant to a proper disposition of this case. It is unquestionable that the Bureau has never taken the position that §5003 requires a prior determination that specialized treatment is unavailable in the state system. It has, to the contrary, accepted state inmates for years without affording such a prior determination:

> The Bureau's administrative construction of the act as not limiting the Bureau to accepting only those prisoners in need of specialized treatment is "entitled to great weight and should be followed unless there are compelling indications that it is wrong."

Lono v. Fenton, supra at 649 (dissenting opinion of Circuit Judge Bauer).

Yet, Congress has not enacted legislation during this period to require the bureau to comply with its putative legislative intent. This inaction on the part of Congress should be interpreted as an indication of congressional intent that no such prior determination need be made by the bureau. Thirteen years after the adoption of §5003, Congress amended the statute to add subsection (d). Subsection (a), which is at issue before this Court, was left undisturbed.

As stated in *Fletcher v. Warden,* 487 F. Supp. 777 (D. Kan. 1979), a decision which finds the majority reasoning in *Lono* unpersuasive and specifically declines to follow it:

> If Congress were at serious odds with the construction given the statute by the Bureau of Prisons they surely would have made some change in the statutory language over the intervening quarter of a century since its passage. *We are faced with a long-standing and consistent interpretation by the agency charged with administration of the statute and that interpretation is entitled to strong judicial deference.* (Citations omitted; emphasis added).

487 F. Supp. at 781–82.

Indeed, the legislative history of the 1965 amendment expressly supports the construction long given §5003 by the Bureau of Prisons. The Senate Report contains no suggestion that §5003 limits transfers to those state prisoners who might require "treatment". Rather, the report refers to the broad purposes of transfer and specifies a number of objectives wholly inconsistent with the thought that the section authorizes transfers for only the purpose of specialized treatment.

The report states the purpose to be:

> This bill would permit the transfer of persons convicted of offenses in the Canal Zone to the custody of the Attorney General for *transfer to prisons within the United States.* (Emphasis added).

Sen. Report No. 799, 89th Cong. 1st. Sess. (1965), reprinted in (1965) U.S. Code Cong. Admin. News, 3595–3598. Under the part captioned *COST* in the Senate Report, it reads: "The Canal Zone Government estimates only three or four persons a year would be returned to the United States for *imprisonment.*" (Emphasis added). *Id.* at 3596. Further, a letter from the Assistant to the Governor of the Canal Zone, which is made a part of the report, explains the amendment as follows:

> The subject bill would amend title 18, United States Code, section 5003, *which authorizes the Attorney General to admit state prisoners to Federal penal and correctional in-*

stitutions when facilities are available, so as to make that section applicable to the Canal Zone.

Id. at 3597.

Clearly, Congress was then put on notice of the construction given 18 U.S.C. §5003(a) by the Federal Bureau of Prisons. By its inaction, Congress acquiesced in that interpretation.

II.

THE PROCEDURES FOLLOWED BY VERMONT PRIOR TO TRANSFERRING PETITIONER TO THE FEDERAL BUREAU OF PRISONS SATISFY ANY ARGUABLE STATUTORY REQUIREMENT[6]

Respondent contends that the exhaustive administrative hearing procedures embodied in Vermont Department of Corrections Policy #891 and the discretionary authority vested in the commissioner pursuant to 28 V.S.A. §706(a)[7] are sufficient as a matter of law to satisfy any pretransfer determination requirement.

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[6]The question presented by petitioner is whether the authority of the Federal Bureau of Prisons to accept state prisoners is "limited by statute". (Brief of Petitioner, page I.) *Amicus curiae,* Families & Friends of Prisoners, Inc., et al., in their brief attempt to present this Court with constitutional claims not raised below nor brought here by the parties. Each of the constitutional claims raised by *amicus curiae* has been examined previously by the District Court in Vermont. *Rebideau, supra; Battick v. Stoneman,* 421 F. Supp. 213 (D. Vt. 1976); *Hohman v. Hogan,* 458 F. Supp. 669 (D. Vt. 1978). None were found to present a constitutional infirmity with respect to state to federal transfer of Vermont prisoners.

If *amicus curiae* wish yet another judicial examination of those claims, they should present the questions first to a District Court in the proper case.

[7]28 V.S.A. §706 (a) (Supp. 1980) provides:

(a)The commissioner may enter into and execute a contract or contracts with the United States for the transfer of any inmate from any facility to a federal correctional facility when, in his opinion, the inmate needs particular treatment or special facilities available at the federal correctional facility; or, all in-state treatment and rehabilitative programs available for the inmate have been considered and found unsuitable; or, all in-state security and custody alternatives for the inmate have been considered and found unsuitable; or, the inmate voluntarily requests transfer.

Significantly, the administrative procedure for out-of-state transfer in general and Policy #891 in particular, both of which were applied in petitioner's case, are procedures established almost exclusively as a result of suggestions and guidance the Department of Corrections received from the United States District Court, District of Vermont.

In *Battick v. Stoneman,* 421 F. Supp. 213 (D. Vt. 1976), the court, in upholding the federal transfer of a Vermont prisoner in accordance with the procedures set out in Policy #891, ruled ". . . that the transfer of the plaintiff Battick to the custody of the United States Bureau of Prisons, pursuant to the provisions of 28 V.S.A. §706, does not offend the Constitution of the United States". 421 F. Supp. at 231. Earlier in that opinion the *Battick* court discussed the historical development of Policy #891, and noted that the policy's format evolved from judicial suggestion and guidance:

> These guidelines are consistent with judicial suggestions made in *Bousley & Messier v. Smith,* Civ. No. 6679 (D. Vt. June 11, 1973) concerning appropriate criteria for out-of-state transfer and are in keeping with the dictates of 28 V.S.A. §706 as amended.
>
> The administrative procedure established for making the decision on transfer of an inmate out of state was designed to conform with the guidance indicated in *Carlson v. Moeykens,* Civ. No. 74-224 (D. Vt. Jan. 24, 1975, amended Mar. 13, 1975).

See 421 F. Supp. at 216–17.

These administrative procedures were followed in the department's decision to transfer petitioner to the Federal Bureau of Prisons. Accordingly, after exhaustive administrative procedures, petitioner was found to require treatment and security not available within Vermont's correctional system.

As the District Court found, petitioner's incarceration in Vermont, within "D" Wing at St. Albans Correctional Diagnostic and Treatment Facility (CDTF), was under the most restrictive of conditions and permitted very limited program op-

portunities. Within a federal prison, however, petitioner enjoyed complete freedom of movement within the institution and access to a broad range of treatment programs. *Howe, supra,* 480 F. Supp. at 113.

State correctional facilities do not change so rapidly that the issue of their adequacy to hold and treat the highest security prisoners must be relitigated at each pretransfer hearing. Federal prison facilities do not change so rapidly that state officials must bring forth evidence of those superior facilities every time a prisoner is to be transferred. The issue at the pretransfer hearing was whether the petitioner, because of his individual circumstances, was unsuited for any in-state treatment or security alternatives.

The determination made by the Commissioner after the hearing was that the Vermont Department of Corrections could not provide the required degree of security nor treatment programs within his security classification. The Commissioner knew of the Federal Bureau of Prisons' security and treatment capabilities. *Id.* at 113. Implicit in his decision to direct petitioner's transfer to the federal system was the determination that the federal system is able to provide for these needs.

Finally, in a practical sense, the degree of security needed in an individual case will define the treatment alternatives available. A correctional system, with its dual goals of prisoner rehabilitation and public protection, cannot be expected to treat a prisoner if it cannot control him, and often it cannot control him without highly restrictive conditions of confinement. Such restrictions, however, often prevent meaningful efforts toward the initial goal of reformation. Thus, if the greater resources of the federal prison system can provide a more open and meaningful rehabilitative setting for high security prisoners, there is no reason to distinguish that type of specialized treatment from psychiatric, psychological, and medical services, or vocational and educational programs, or treatment for drug and alcohol addicts and youthful offenders.

Accordingly, Respondent Ciuros submits there was a pre-

transfer determination that the federal system could provide specialized treatment which was not available within the Vermont correctional system. The pretransfer procedures, therefore, more than satisfy any arguable requirements of section 5003(a).

III.

PROPER CONSTRUCTION OF 18 U.S.C. §5003, AUTHORIZING STATE TO FEDERAL TRANSFERS OF PRISONERS, RESTS ON THE LANGUAGE OF THE STATUTE AND NOT ON POLICY CONSIDERATIONS RAISED BY PETITIONER

Petitioner, in his brief to this Court, interjects certain policy considerations which he believes vitiate against a plain meaning construction of section 5003(a). He first argues that Vermont is a signatory to the New England Corrections Compact, 28 V.S.A. §§1401 et seq.; and to the Interstate Corrections Compact, 28 V.S.A. §§1601 et seq. These Compacts authorize the party states to contract with each other for the confinement of an inmate convicted of a crime in the sending state in an institution situated in the receiving state.

Petitioner contends that if confinement is what the state needs, it can proceed pursuant to one of the compacts.[8] The question presented to this Court, however, is whether section 5003 permits a state to federal transfer absent a determination of specialized treatment needs not available in the state. If the question were one of which is the better option, the teachings of Chief Judge Holden would be particularly applicable here:

> Transfer of prisoners to the federal system was adopted over correctional facilities in sister states for the reason that the federal system, with its vast resources and broad base of varying types of facilities for different classifications of persons committed to its custody, could better serve the needs

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[8]Petitioner is correct; the state does sometimes transfer an inmate to another state when circumstances suggest that is the better course.

> of rehabilitation and confinement than any other correctional system. The federal policies of correction are more in keeping with those of the State of Vermont. Vermont's neighboring states are confronted with much the same budgetary problems that beset this state and the facilities available in the neighboring states are not equipped to accept additional out of state transfers.

Rebideau v. Stoneman, 398 F. Supp. 805, 811 (D. Vt. 1975), *aff'd* 575 F.2d 31 (2d Cir. 1978) (per curiam). The question presented for review by this Court, however, is not one of which option is the better. Rather, it is a question of whether one option, that of federal transfer, is permissible under the existing statutes without a pretransfer determination of specialized need. As this Court admonished in *Bell v. Wolfish,* 441 U.S. 520 (1979),

> [T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside the Judicial Branch of Government.

Id. at 562. Accordingly, petitioner's argument of the options available to the state has no bearing on the resolution of the question he presented to this Court: whether 18 U.S.C. §5003(a) requires a state to federal transfer of a prisoner be preceded by a determination of specialized treatment needs not available in the state.

Petitioner further argues that the state was able to incarcerate him tolerably well for many months prior to his transfer to the federal system. During the entire period, however, petitioner was a detentioner.[9] As this Court observed in *McGinnis v. Royster,* 410 U.S. 263 (1973):

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[9]Petitioner was sentenced on 2 February 1977. His transfer hearing was conducted on 22 February 1977.

> [I]t would hardly be appropriate for the state to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.

Id. at 273.

The intent of the statute is to be found in its language. *United States v. Goldenberg,* 168 U.S. 95 (1897). The "policy implications" raised by petitioner would be better directed to the legislative branch of government.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, SR., PETITIONER

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, NORMAN CARLSON, DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS, AND WILLIAM CIUROS, JR., COMMISSIONER OF CORRECTIONS, STATE OF VERMONT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether transfer of a state prisoner to federal custody under a contract pursuant to 18 U.S.C. 5003 is prohibited in the absence of a showing that the particular prisoner being transferred has a need for "treatment" that is available in the federal, but not the state, prison system.

2. Whether, if 18 U.S.C. 5003(a) prohibits the transfer of a state prisoner unless that individual is in need of "treatment," "treatment" is properly construed as including maximum security incarceration accompanied by the full range of programs available to similarly situated federal prisoners.

3. Whether, if a finding of an individualized treatment need is a statutory precondition to transfer, and maximum security incarceration satisfies the individualized treatment need requirement, petitioner was afforded all the process that was due him by the hearing conducted by the State of Vermont and the Director's certification that federal facilities were available.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 38-45) is reported at 625 F.2d 454. The opinion of the district court (J.A. 31-37) is reported at 480 F. Supp. 111.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1980. The petition for a writ of certiorari was filed on September 15, 1980, and was granted on January 26, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 5003 provides:

Custody of State offenders

(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

(b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

(d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

STATEMENT

1. By 1974, the State of Vermont had only one maximum security facility—"[t]he archaic Windsor prison" (*Rebideau* v. *Stoneman*, 398 F. Supp. 805, 808 (D. Vt. 1975), aff'd, 575 F.2d 31 (2d Cir. 1978)). In late December of that year, then Commissioner of Corrections of Vermont, R. Kent Stoneman,

announced that for financial reasons he would close the 187 year old prison by June 30, 1975. Vt. Stat. Ann. tit. 28, § 102(c)(11) (1970) requires the Commissioner of Corrections to close any correctional facility that he deems inadequate, and the Commissioner found Windsor prison to be inadequate in numerous respects (see 398 F. Supp. at 808 n.7).

Prior to the actual closing of the prison, and in contemplation of that event, the United States and Vermont entered into a contract under 18 U.S.C. 5003.[1] The contract recited that Vermont intended to close its only maximum security prison as a result of the agreement, and that the Director of the United States Bureau of Prisons had certified that facilities were available at federal institutions to accommodate up to 40 Vermont prisoners. The contract further provided that in reliance thereon Vermont would "take action to terminate its capability from [*sic*] maximum security within the State." Accordingly, in the event the United States elected to terminate the contract, it was required to give Vermont three years' notice in order "to permit the development of a new max..num security facility or appropriate alternative resource contract usage" (J.A. 10-12).

Windsor prison was closed in August 1975. With its closing, Vermont's correctional facilities were reduced to several minimum security community correctional centers located throughout the State and the Vermont Correction and Diagnostic Treatment Facility at St. Albans, Vermont. The function of the community centers is to integrate prisoners into the community through work release and furlough programs. As its name indicates, the St. Albans facility contains a diagnostic component; it also has a lim-

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[1] The Vermont legislation reciprocal to 18 U.S.C. 5003 is Vt. Stat. Ann. tit. 28, § 706 (Cum. Supp. 1980), which is set out at J.A. 34 n.2.

ited medium security capacity. The facility functions essentially as a holding point for inmates whom the Department of Corrections expects to place in community correctional centers in the foreseeable future. While it has a small inner perimeter security component for short-term incarceration of inmates with high security needs (*e.g.*, for the purpose of holding prisoners in-state when required for state court proceedings), St. Albans is not designed for custody of long-term inmates who present a high security risk. See *Battick* v. *Stoneman*, 421 F. Supp. 213, 216 (D. Vt. 1976).

2. Petitioner was convicted in Vermont state court of first degree murder; he was sentenced to life imprisonment on February 2, 1977. He initially was sent to St. Albans to begin service of his sentence. Because of the nature of his offense and the length of his sentence, however, petitioner was classified as a prisoner requiring maximum security custody (J.A. 39).

Accordingly, on February 22, 1977, the Vermont Department of Corrections held a hearing to determine whether petitioner should be transferred to an out-of-state institution. Pursuant to Vermont Department of Corrections Policy No. 891 (J.A. 14-18), petitioner was afforded advance notice of the hearing and the reasons for the proposed transfer, and the opportunity to be present at the hearing, to testify on his own behalf, to call witnesses, to present documentary evidence and to be represented by lay counsel from the facility staff. Petitioner attended the hearing, at which he was represented by lay counsel who submitted various items of evidence in opposition to the proposed transfer (J.A. 21-29).

The hearing officer recommended that petitioner be transferred to an out-of-state institution on the

ground that "no treatment programs exist in the State of Vermont which could provide both treatment and long term maximum security supervision" for petitioner, who, the hearing officer found, was dangerous and could not be integrated into a community based program. The hearing examiner relied in part on a psychiatric report that described petitioner as "a most dangerous person who could well repeat the same pattern of assaultive behavior toward women at any time in the future" (petitioner's conviction for first degree murder arose out of the rape and strangulation of an elderly woman who lived next door to him). He also found that petitioner would be " 'highly resistant to treatment' " and that he was an escape risk, having escaped from the maximum security wing of St. Albans. On March 9, 1977, the Acting Commissioner of Corrections for the State of Vermont approved petitioner's transfer to the federal prison system (J.A. 19-20, 25-26).

Petitioner was then transferred to federal custody pursuant to the contract between the United States and Vermont described above. Petitioner initially was incarcerated in the federal penitentiary at Atlanta, Georgia. Subsequently, he was transferred to the federal penitentiary at Terre Haute, Indiana (J.A. 33).

3. Thereafter, petitioner filed this civil action in the United States District Court for the District of Vermont, naming as defendants the Attorney General of the United States and the Director of the United States Bureau of Prisons. Relying on the then recent decision in *Lono* v. *Fenton*, 581 F.2d 645 (7th Cir. 1978) (en banc), petitioner sought an injunction and a declaratory judgment on the ground that the federal defendants were not authorized to accept custody

of him unless he needed and there existed a specialized treatment program available in the federal prison system and not available in the state facilities.[2] Respondent Ciuros' predecessor, the then Acting Commissioner of Corrections of the State of Vermont, was permitted to intervene in the action (J.A. 31-32).

Following a trial, the district court denied any relief, holding (J.A. 36-37) that

> notwithstanding any indication from the legislative history of the [A]ct to the contrary, * * * the [A]ct plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with the contract under which [petitioner] was so transferred. * * * In contracting with state officials, 18 U.S.C. 5003(a) requires nothing more of the Director of the Bureau of Prisons than a certification that facilities exist within the federal system in which state prisoners may be accommodated. That requirement has been met in the case at hand.

The court of appeals affirmed, stating concisely (J.A. 44) that petitioner's argument "has no basis in the language of the statute."

4. While the petition for a writ of certiorari to review the court of appeals' decision was pending, the Seventh Circuit decided *Anthony* v. *Wilkinson*, Nos. 79-2362, etc. (Dec. 23, 1980), petition for cert. pending *sub nom. Hawaii* v. *Mederios*, No. 80-1315 (filed Feb. 4, 1981). For the most part, that court adhered

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[2] At the time petitioner filed the complaint in this case, he was temporarily back at St. Albans to attend state court proceedings in Vermont (J.A. 4).

to the view it had expressed in *Lono* that Section 5003 "requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system" (slip op. 11), observing that "principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in *Lono*" (slip op. 13). While recognizing (slip op. at 17) that transfers based on security considerations may satisfy the "specialized treatment" requirement of *Lono* "if a sufficient array of programs is provided in connection with incarceration in a maximum security prison," the court nonetheless held that the transfers at issue were impermissible because the prisoners had not been accorded due process.[3] Contrasting the discretionary transfer of prisoners within a particular system upheld by this Court in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), with the state-to-federal transfer authorized by 18 U.S.C. 5003, the *Anthony* court found (slip op. 21) that Section 5003 creates in state prisoners "a liberty interest deserving of due process protection." Accordingly, the court held that "there must be a federally conducted hearing" (slip op. 27-29) accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972)), in order to determine "the need for specialized treatment and how it could be met in the federal system" (slip op. 26).

Thereafter, both the United States and the State of Vermont acquiesced in the petition for a writ of certiorari in this case on the ground that this Court's intervention is necessary to resolve the conflict be-

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[3] In *Lono*, the court had found it unnecessary to decide what process was due a state prisoner prior to his transfer to the federal system (581 F.2d at 646).

tween *Lono* and *Anthony*, on the one hand, and the decisions of the court below, the First Circuit (in *Sisbarro* v. *Warden*, 592 F.2d 1, cert. denied, 444 U.S. 849 (1979)) and the Third Circuit (in *Beshaw* v. *Fenton*, No. 79-1777 (Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981)), on the other hand.[4]

SUMMARY OF ARGUMENT

I.

18 U.S.C. 5003(a) was enacted in 1952, at a time when the federal prison system was not filled to capacity, and in response to requests by the states that the Federal Bureau of Prisons assume custody of state offenders for whom state facilities were inadequate. The statute authorizes the Attorney General, when the Director of the Federal Bureau of Prisons certifies that "adequate and proper treatment facilities and personnel are available," to contract with the states for the "custody, care, subsistence, educa-

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[4] Subsequent to the Court's granting the petition for a writ of certiorari in this case, the Tenth Circuit followed "the clear weight of authority" holding that Section 5003 does not condition the transfer of state prisoners to the federal system on a showing of a specialized treatment need available only in the federal system. *Fletcher* v. *Warden*, Nos. 79-1156, etc. (Feb. 13, 1981).

While the latest Seventh Circuit decision appears to represent some modification of its prior outright rejection of security needs as a justification for transfer under Section 5003, that court continues to read the statute as being significantly conditioned upon the need for and provision of specialized treatment in the federal facilities. Its approach thus continues to conflict with the interpretation given to the same statute by the First, Second, Third and now Tenth Circuits. Indeed, the conflict among the circuits is aggravated by the addition of new procedural requirements by the Seventh Circuit not imposed by the others.

tion, treatment, and training" of state prisoners. Despite the broad authority apparently conferred by this language, petitioner argues that the statute authorizes the transfer of a state prisoner to federal custody only for the purpose of specialized treatment, and that prior to the contemplated transfer the statute requires the federal government to make an individualized determination that a prospective transferee is in need of some specialized treatment that is available in the federal, but not in the state, prison system.

A. Petitioner's argument has no basis in the statutory language. Treatment is not the only purpose for transfer that is authorized by 18 U.S.C. 5003 (a). Rather, the statute also provides for contracts for the custody, care, subsistence, education and training of state prisoners.

Nor is there any basis in 18 U.S.C. 5003(a) for a requirement that the federal government (or any body) make a case-by-case determination of whether each state prisoner whose transfer is sought needs some sort of specialized treatment available only in the federal system. Nothing on the face of Section 5003(a) suggests that it does, or was intended to, confer protections upon the anticipated state transferees. Rather, Section 5003(a)'s certification requirement is simply an internal agency housekeeping measure designed to ensure that the contracting federal official knows whether there are sufficient resources within the federal prison system to warrant the exercise of the statutory authority to contract. Moreover, the language of Section 5003(a) contemplates contracts for *groups* of prisoners and refers to the certification in connection with the *group* contracts contemplated by it.

In any event, as is true of other statutorily required certifications by Department of Justice officials, the certification required by Section 5003(a) is not subject to judicial scrutiny at the behest of individual prisoners. Such judicial restraint is particularly appropriate here, where the certification specified by the statute is purely internal to the Executive Branch. Indeed, once the Attorney General delegated the responsibility to enter into Section 5003 contracts to the Director of the Bureau of Prisons (see 28 C.F.R. 0.95 (g)), the certification requirement would appear to have become superfluous.

B. We view the plain language of Section 5003(a) as so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v *Hochfelder*, 425 U.S. 185, 201 (1976)). Even resort to the legislative history does not avail petitioner, however. That history reflects that the statute was enacted to provide the states opportunities to place prisoners in federal custody, "reciprocal" to the already authorized (18 U.S.C. 4002) transfer of federal prisoners to state custody, which was and is permitted without reference to any "treatment" needs. Congress also believed that the statute would bring about economies in the operation of the federal prison system.

Most of the legislative history on which petitioner relies (Br. 16-17) merely describes the types of requests the Bureau had received from the states, but does not reflect a Congressional purpose to restrict the Bureau's administrative discretion to determine the types of prisoners it would contract to receive or the purposes for which it might assume federal custody over state prisoners. Moreover, from Congress's point of view of reducing the overhead expenses of maintaining the federal institutions by taking in state prisoners, for whom the states would reimburse the

federal government, it mattered not whether the state transferees would be in need of treatment.

Nowhere in the legislative history is there a shred of evidence that, in conferring upon the Attorney General broad authority to contract with the states for the "custody, care, subsistence, education, treatment, and training" of state prisoners, Congress intended to confer any statutory *protection* on individual state prisoners against transfer to federal custody—to be enforced by a plethora of suits in the federal courts. Rather, the statute was quite clearly enacted for the benefits it was expected to confer upon state and federal correctional systems, and it should be construed in light of that underlying purpose.

C. Ever since Section 5003 was enacted in 1952, the Bureau has construed it as placing no restrictions on the Attorney General's authority to contract for custody of state prisoners. This contemporaneous and consistent construction of a statute by the agency that suggested its enactment and is charged with its enforcement is entitled to great deference.

D. Finally, to construe Section 5003(a) as narrowly as petitioner suggests would thwart the statute's underlying principle of matching surplus federal facilities with the perceived needs of the states. As construed and applied by the Bureau of Prisons, the statute's contracting authorization has fulfilled important and compelling needs of state correctional systems. Petitioner's proposed construction of the statute would deprive the federal government of the authority not only to aid the states in secure incarceration of dangerous offenders, but also to take custody of state prisoners whose lives are endangered if they remain in the state prison system or who, although they do not need "treatment" in the narrow

sense urged by petitioner, could benefit from access to education or training programs available in the federal system.

II.

Even if the statute read as petitioner urges this Court to construe it—that no state prisoner may be transferred to the federal system unless he needs specialized treatment available only in the federal prison system—petitioner nonetheless is properly in federal custody because he needs maximum security incarceration not available in Vermont, and because provision of secure facilities offering programs appropriate for long term custodial confinement constitutes "treatment" within the meaning of the statute.

This is one issue on which the circuits are not divided. Even the Seventh Circuit, which alone supports petitioner's primary submission that the federal authority to accept custody of state prisoners is limited to individuals who are in need of "treatment," includes within the definition of "treatment" security and protective custody, where accompanied by a sufficient array of programs. Moreover, a construction of the word "treatment" that includes maximum security incarceration and protective custody comports with the Bureau's contemporaneous and consistent construction of the statute. In its first annual report after enactment of Section 5003, the Bureau stated that the new authority would encompass transfer of "a vicious intractable offender who cannot be handled readily in [the state's] own institutions * * *."

III.

Assuming *arguendo* that Section 5003(a) creates a liberty interest in a state prisoner not to be transferred to federal custody except for the purpose of treatment, petitioner has received any process that was due him.

Petitioner contends that the *federal government* must afford a state prisoner who is scheduled for transfer to the federal system the same amount of process that is due a parolee whose parole is sought to be revoked (*Morrissey* v. *Brewer*, 408 U.S. 471 1972)) or a state prisoner whose transfer to a mental institution is sought (*Vitek* v. *Jones*, 445 U.S. 480 (1980)). But petitioner's interest in not being transferred from a state institution to a federal institution is far less substantial than a parolee's interest in remaining free from *any* incarceration or a prisoner's interest in not being arbitrarily classified as mentally ill and placed in a mental hospital.

Moreover, there is no basis in the statute for requiring the Director of the Federal Bureau of Prisons to duplicate the State's determinations whether a state prisoner needs specialized treatment and whether the state could afford him such treatment. Indeed, such a decision-making process would increase the likelihood of an erroneous determination, since those questions are the ones that the Director of the Federal Bureau of Prisons is least qualified to answer. In sum, whatever process, if any, may have been due petitioner, it was afforded him by the hearing that was held by the State of Vermont and the Director's certification that federal facilities were available.

ARGUMENT

After being convicted of first degree murder and sentenced to life imprisonment, petitioner was classified by Vermont prison authorities as "a most dangerous person" and an escape risk who required maximum security confinement. Because Vermont has

no facilities for long-term custody of inmates under maximum security conditions, it decided that petitioner should be transferred to federal custody pursuant to the contract previously entered into between it and the United States under 18 U.S.C. 5003. Subsection (a) of that statute provides, in pertinent part, as follows:

> The Attorney General, when the Director [of the Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory * * *.

While petitioner does not claim any substantive constitutional right to be imprisoned only in the state of his conviction (Br. 8-9, 41 & n.10, 42)[6] or deny that the formal requirements of the statute (*i.e.*, the existence of a certification by the Director and of a contract between the United States and Vermont) have been met, he nevertheless challenges the lawful-

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[6] In view of petitioner's concession, indeed, suggestion (Br. 8-9, 41 & n.10, 42) that he could be incarcerated outside the State of Vermont pursuant to either the New England Interstate Corrections Compact, Vt. Stat. Ann. tit. 28, § 1401 *et seq.* (1970), or the Interstate Corrections Compact, Vt. Stat. Ann. tit. 28, § 1601 *et seq.* (1970), petitioner would have no complaint if he found himself in exactly the same position, by virtue of an agreement between Vermont and the State of Indiana to house Vermont prisoners in an Indiana facility located at Terre Haute, rather than by virtue of an agreement between the federal government and Vermont.

ness of his transfer to federal custody upon both substantive and procedural grounds.

Petitioner's substantive claim is that his placement in federal custody violates the requirements of Section 5003, which in his view prohibits such transfers except for the purpose of "treatment" of the prisoner. The concept of "treatment," he argues, is limited to such things as medical or psychiatric treatment, alcohol or drug rehabilitation programs, and special facilities for juvenile or youth offenders; it does not, he contends, include facilities for secure incarceration of dangerous prisoners. Petitioner's procedural due process claim goes from the premise that the statute requires an individualized determination of a transferee's treatment need to the conclusion that any transfer under the statute is invalid unless the federal government has made a determination, under appropriate procedures, matching the treatment needs of the individual to the special facilities available in the federal but not the state prison system to meet such needs.

The issues presented by this case are thus three, which ought logically to be considered in sequence:

(1) Where the Director has certified that facilities are available, and there exists a contract pursuant to which a prisoner is transferred, is that transfer prohibited by Section 5003 in the absence of a showing that the particular prisoner being transferred has a need for "treatment" that is available in the federal but not the state prison system? In Part I, *infra*, we argue that the statute imposes no condition precedent to transfer that the purpose of a particular inmate's transfer be for "treatment"; rather, the transfer is lawful when the formal certification and contract re-

quirements have been fulfilled. If we are correct in this, the case is at an end.

(2) If, however, the Court concludes that Section 5003 is properly construed as a prohibition upon the transfer of any state prisoner unless that individual is in need of "treatment," it should next consider the content of the "treatment" requirement. In Part II of this brief we argue that the concept of "treatment" is a broad one encompassing the provision of secure custodial conditions (accompanied by the full range of customary programs for similarly situated federal convicts) for dangerous or escape-prone prisoners.

(3) If a finding of individualized treatment need is a statutory precondition to transfer, then we agree that some process would be due in connection with the inquiry into petitioner's need for "treatment." In Part III, *infra*, we argue that the hearing afforded petitioner by Vermont prior to his transfer fully satisfied any applicable procedural due process requirement, and that no separate federal hearing is required.

I. THE AUTHORITY OF THE FEDERAL GOVERNMENT TO ACCEPT CUSTODY OF STATE PRISONERS UNDER 18 U.S.C. 5003(a) IS NOT CONDITIONED ON A SHOWING THAT THE STATE PRISONER IS IN NEED OF SPECIALIZED TREATMENT AVAILABLE ONLY IN THE FEDERAL PRISON SYSTEM

A. The Plain Language of the Statute Confers Broad Authority Upon the Attorney General to Contract for Custody of State Prisoners Without Reference to a Prisoner's Individualized Treatment Needs

It is by now axiomatic that "the starting point for interpreting a statute is the language itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 5; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). The plain language of 18 U.S.C. 5003(a) authorizes the Attorney General to contract not only for the purpose of treatment, but also for the purposes of "custody, care, subsistence, education, * * * and training" of state prisoners—"a list that runs the gamut of penological purposes." *Sisbarro* v. *Warden*, 592 F.2d 1, 4 (1st Cir.), cert. denied, 444 U.S. 849 (1979). As the court below found (J.A. 44), "[n]othing in this grammatical construction gives 'treatment' the primacy which [petitioner] contends for, or provides a basis for concluding that, whatever other services are provided, treatment must in all events be furnished prisoners subject to any federal-state contract authorized by the statute." Accord, *Fletcher* v. *Warden*, Nos. 79-1156, etc. (10th Cir. Feb. 13, 1981);

Beshaw v. *Fenton*, No. 79-1777 (3d Cir. Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981); *Sisbarro* v. *Warden*, *supra*.[6]

1. Petitioner argues (Br. 11-12) that the phrase in the statute that the Director "shall certify that proper and adequate treatment facilities and personnel are available" requires the federal government to make a pre-transfer determination that each prisoner whom a state proposes to transfer to federal custody is in need of specialized treatment available only in the federal system. Petitioner nowhere attempts to explain how the words of the statute, including its certification provision, could be read to state such a requirement. In effect, without pausing to analyze the language actually used by Congress, petitioner simply urges the Court to read Section 5003(a) as if it provided that "no state prisoner may be transferred to the federal prison system until the Director certifies that he is in need of specialized treatment available only in the federal prison system."

To be sure, statutes so worded, "which expressly identif[y] the class Congress intended to benefit" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 690 (1979)), have been held to create individualized federal rights. In *Cannon*, for instance, the Court held that Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), which provides that "[n]o person in the United States shall" be discriminated against on the basis of sex by any

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[6] We note that Section 5003(a)-(c), as passed by both Houses of Congress (97 Cong. Rec. 13543 (1951); 98 Cong. Rec. 4801 (1952)), carried the title "Custody of State offenders." While a title does not control over the terms of a statute (*United States* v. *Will*, No. 79-983 (Dec. 15, 1980), slip op. 28), here the title supports the conclusion drawn from the statutory language—that there are no limitations on the purposes for which a state prisoner may be transferred to federal custody; simple custody is a sufficient reason for transfer.

education program or activity receiving federal financial assistance, includes a private right of action. Similarly, *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), found individual rights to have been created by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which provides that "no person" shall be denied the right to vote for failure to comply with new state enactments that were covered by, but had not been approved under, that statute.

By contrast, however, the statute under consideration in this case—18 U.S.C. 5003(a)—does not contain the individualized "no person" formulation.[7] Rather, Section 5003(a) is simply a broad grant of authority to the Attorney General to contract with the states for the full range of penological purposes. Nothing on the face of Section 5003(a) suggests that it does or was intended to confer protections upon the anticipated state transferees. Certainly the certification clause—on which petitioner's argument necessarily depends to overcome the otherwise broad contracting authority expressly given to the Attorney General—does not by its terms condition or restrict that power or suggest that individual transfers are subject to attack in federal court.

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[7] We note, however, that Congress did employ the more individualized language in subsection (c), which provides:

> Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

In contrast to petitioner's situation, a state prisoner in federal custody claiming some denial to him of rights or privileges conferred by law or regulation on federal prisoners could at least point to the language of this subsection in arguing that it confers a statutory right on him to equal treatment.

We submit that the certification requirement is properly understood as nothing more than an internal agency housekeeping measure designed to ensure that the contracting federal official knows whether there are sufficient resources within the federal prison system to warrant the exercise of the statutory authority to contract.[8] Since Congress presumably contemplated that the Attorney General might delegate the contracting function to some other bureau or division within the Department of Justice, the certification requirement ensured that the Department would not contract to take state prisoners without ascertaining from the Bureau of Prisons that there were adequate facilities and personnel for them.[9]

Our contention that Section 5003(a) does not require determinations of individual treatment needs is further supported by the fact that its statutory language contemplates that federal-state contracts will be for *groups* of prisoners—"[t]he Attorney Gen-

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[8] Cf. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980) (primary purpose of the Federal Records Act of 1950, 44 U.S.C. 2901 *et seq.*, and the Records Disposal Act, 44 U.S.C. 3314, was the "establishment of a useful system of documentation that will enable [the executive] to have the information he needs available when he needs it;" quoting from S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950)); *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970) (ICC regulations that required motor carriers to provide information demonstrating that they met the statutory standards "were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications * * *" (*id.* at 538) and were "mere aids to the exercise of the agency's independent discretion" (*id.* at 539)).

[9] In view of the fact that the individual to whom the Attorney General has delegated his authority to contract under Section 5003(a) is the Director of the Bureau of Prisons (28 C.F.R. 0.95(g)), the formal certification procedure may no longer be necessary.

eral * * * is hereby authorized to contract with the proper officials of *a* State or Territory for the custody, care, subsistence, education, treatment, and training of *persons* convicted of criminal offenses in the courts of such State or Territory" (emphasis added). Since the statute refers to the certification in connection with the *group* contract contemplated by it, Section 5003(a) does not by its terms or by reasonable implication require that the Director certify that a particular institution can satisfy specialized treatment needs of a particular transferee.

In any event, the certification is not subject to judicial scrutiny at the behest of individual prisoners. When presented with challenges to other requirements of certifications by Department of Justice officials, this Court and several courts of appeals have consistently restricted judicial inquiry to considering only whether the certification required by statute was made, and have refused requests by litigants to look behind the face of the certification. See *Ullman* v. *United States*, 350 U.S. 422, 432-434 (1956) (involving former 18 U.S.C. (1964 ed.) 3486, which conditioned grants of immunity on, *inter alia*, "the judgment of a United States Attorney [that] the testimony of any witness * * * is necessary to the public interest * * *"); [10] *United States* v. *Carter*, 493 F.2d 704 (2d Cir. 1974) (involving 18 U.S.C. 3503, which requires that a motion by the government to take the

[10] Similarly, 18 U.S.C. 6003, which replaced 18 U.S.C. (1964 ed.) 3486, presently provides that a United States Attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request that a witness be granted immunity when, in the judgment of the United States Attorney, "the testimony or other information from such individual may be necessary to the public interest."

deposition of a prospective witness or party contain a certification by the Attorney General or his designee that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity"); *United States* v. *Kleve*, 465 F.2d 187, 190 (8th Cir. 1972) (18 U.S.C. 3731, permitting the United States to appeal from an order suppressing or excluding evidence or requiring the return of seized property if the United States Attorney certifies that "the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding"); *United States* v. *Singleton*, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973) (18 U.S.C. 3503); *United States* v. *Comiskey*, 460 F.2d 1293, 1297-1298 (7th Cir. 1972) (18 U.S.C. 3731).[11]

In all of the foregoing cases, the certification was statutorily required as a prerequisite to some judicial action, yet the courts resisted invitations to look be-

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[11] 18 U.S.C. 5012 specifies that "[n]o youth offender shall be committed to the Attorney General under [the Federal Youth Corrections Act] until the Director shall certify that proper and adequate treatment facilities and personnel have been provided." The only court of appeals decision of which we are aware that construes that certification provision holds that it merely concerned "the starting point for the Act," that it had been satisfied by the Attorney General's one-time certification of certain facilities as available to receive Youth Corrections Act commitments, and that a YCA sentence could not be challenged by an individual offender for lack of a certification in his case. *Robinson* v. *United States*, 474 F.2d 1085, 1091 (10th Cir. 1973).

While 18 U.S.C. 3651 (suspension of sentence and probation) and 18 U.S.C. 4253 (commitment of addicts) also provide for certification of treatment facilities, personnel, and programs by the Attorney General, we have found no cases construing those provisions.

hind them. The appropriateness of such restraint is even greater where, as here, the certification specified by the statute is purely internal within the Executive Branch, to be made by a subordinate to his superior. Indeed, once the Attorney General delegated the responsibility to enter into Section 5003 contracts to the Director of the Bureau of Prisons (28 C.F.R. 0.95(g)), the certification requirement would appear to have become superfluous. For this reason, the fact that the certification contained in the contract with Vermont is not in the precise language of the statute (which of course does not require that any certification be made by the Director to the contracting state) affords petitioner no ground for relief.

2. Petitioner further contends (Br. 11-20) that the phrase "treatment facilities" in Section 5003 shows that Congress intended narrowly to limit the purposes for which a state prisoner may be transferred to federal custody. To be sure, other federal statutes refer to federal prisons as "penal and correctional institutions." See, *e.g.*, 18 U.S.C. 4001, 4005, 4042. But those provisions, which were enacted by different Congresses from that which enacted Section 5003, concern the operation and management of federal prisons as institutional entities. Section 5003, in contrast, recognizes the availability for state prisoners of the broad range of treatment facilities provided within the various federal penal and correctional institutions. And, given the number and variety of treatment programs available in the federal prison system both in the 1950's and now,[12] Congress's

[12] Treatment facilities that were available in the federal prison system in the early 1950's included, *inter alia*, programs for narcotic addicts, juvenile facilities, programs especially designed for Puerto Ricans, educational and vocational

reference to "treatment facilities" must be viewed as simply an accurate characterization of the broad spectrum of services and programs potentially available to state prison transferees. As the court below explained (J.A. 45), the phrase chosen by Congress "simply named [federal prisons] in terms of the most laudable (if, perhaps, least often realized) goal the institutions serve, namely, the reform of prisoners through treatment."

3. Petitioner's construction of subsection 5003(a) also appears to render 18 U.S.C. 5003 internally inconsistent. According to petitioner's view, he can only be housed in or moved to a federal prison that affords him "specialized treatment" that he needs and cannot get in state prison. However, federal prisoners can be transferred from one place of confinement to another at the sole discretion of the Attorney General (18 U.S.C. 4082(b)), and subsection (c) of 18 U.S.C. 5003 provides that state prisoners

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programs, religious programs, employment, medical and dental services, recreation, individual and group psychiatric counseling, music programs, and Alcoholics Anonymous groups. Bureau of Prisons, Department of Justice, *1952 Annual Report* 5, 12, 14, 15, 19, 22, 23, 24, 26; Bureau of Prisons, U.S. Department of Justice, *The Terre Haute Penitentiary* 12, 16 (1953); Bureau of Prisons, U.S. Department of Justice, *Federal Correctional Institution La Tuna, Texas* 14, 15 (1955).

Currently, the federal system provides educational programs, medical, dental, and optical services, psychiatric and psychological services, drug abuse programs, alcohol treatment facilities, Youth Corrections Act programs, marriage and family counseling, vocational training, employment in prison industries, work release programs, chaplaincy services, recreational facilities and group activities such as the Jaycees. See Federal Prison System, U.S. Department of Justice, *Facilities 1980*.

transferred thereunder will "be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed." Accordingly, consideration of 5003(a) and 5003(c) together suggests that the certification required by the former is only that the federal prison system have the capacity to afford state prisoners the same facilities it affords federal prisoners.[13]

B. The Legislative History Confirms that the Contractual Authority Conferred on the Attorney General by 18 U.S. 5003 is very Broad

While the plain language of Section 5003 is so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976)), an examination of the legis-

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[13] Petitioner's additional reliance on 18 U.S.C. 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," is also misplaced. The legislative history of 18 U.S.C. 4001(a) reveals that it was enacted in conjunction with the repeal of the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950), 50 U.S.C. (1964 ed.) 811-826. The Emergency Detention Act had permitted, upon a declaration of "internal security emergency" by the President, the detention of persons if reasonable ground existed to believe they would engage in acts of espionage or sabotage. Section 4001(a) thus was enacted as a guarantee against the unlawful detention of persons who had not been convicted, a class of which petitioner clearly is not a member. See H.R. Rep. No. 92-116, 92d Cong., 1st Sess. (1971).

In any event, Section 4001(a) does not further petitioner's argument. If, as we contend, he is lawfully incarcerated in the Federal Prison System pursuant to 18 U.S.C. 5003(a), then Section 4001 is fully satisfied.

lative history confirms that the contractual authority conferred on the Attorney General by Section 5003 is very broad.

S. 2160, 82d Cong., 1st Sess. (1951), which contained what is now 18 U.S.C. 5003(a)-(c), was enacted in 1952 in response to requests by the states (which had housed federal prisoners until the federal government built its own institutions) that the Federal Bureau of Prisons assume custody of state of-offenders for whom state facilities were inadequate. In introducing S. 2160, Senator McCarran gave the following explanation for it (97 Cong. Rec. 13543 (1951); emphasis supplied):

> At the present time the Attorney General is authorized by law to make contracts with State officials for the purpose of temporary confinement of Federal prisoners. This bill would authorize a more or less *reciprocal arrangement* whereby, under certain conditions in a limited category of cases, at no expense to the Federal Government, the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws.

The legislation to which Senator McCarran referred as authorizing the United States to contract with the states for the housing of federal prisoners is 18 U.S.C. 4002. That statute authorizes the Director of the Bureau of Prisons to contract with local authorities for the "imprisonment, subsistence, care, and proper employment" of "persons held under authority of any enactment of Congress." Petitioner's narrow construction of Section 5003(a) is thus at odds with Senator McCarran's description of that statute as "reciprocal" to the Director's broad authority to transfer federal prisoners to local facilities under 18 U.S.C. 4002. Contrary to peti-

tioner's suggestion (Br. 17), Senator McCarran's reference to "certain conditions in a limited category of cases" probably reflects his belief that in most cases the states would have the necessary facilities to handle their own prisoners, as has proven to be true (see note 17, *infra*).

Moreover, most of the legislative history relied on by petitioner (Br. 16-17) was more concerned with explaining the states' need for a measure such as S. 2160 than with describing the situations to which it would apply, if enacted. Thus, the references in the legislative history to the Bureau of Prisons undertaking the "custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States" (H.R. Rep. No. 1663, 82d Cong., 2d Sess. 1 (1952); see also *id.* at 3; S. Rep. No. 978, 82d Cong., 1st Sess. 1, 2 (1951)) merely described the specific requests that the Bureau had received from the states.

The action taken by Congress was not wholly devoid of self-interest, however. Rather, Congress recognized (H.R. Rep. No. 1663, *supra*, at 1-2) that there was a surplus of federal facilities and that "the accommodation of State prisoners will materially help to reduce the overhead expenses of maintaining and running these Federal prison institutions. While there will be additional expenses in connection with an inmate's subsistence, medications, etc., which will, of course, be charged to the states, the use of Federal facilities and personnel—a continuing expense heretofore maintained through Federal appropriation—will also be charged to the states, thus reducing these fixed expenses of the Government." For Congress's own purposes, it was thus immaterial whether the transferees would be in need of treatment.

Only one sentence of one committee report (which was not even printed until five months after the Senate had already passed S. 2160)[14] even tangentially supports petitioner's contention that a state prisoner cannot be transferred to federal custody unless he is determined to need specialized treatment available only in the federal prison system. In H.R. Rep. No. 1663, *supra*, at 2, the House Committee on the Judiciary stated that "the proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." But even that statement makes no mention of "specialized" treatment, a pre-transfer determination, or unavailability of facilities in the state system. This single statement—otherwise unexplained—is far too fragile a basis, we submit, for disregarding the plain language of the statute and the Bureau's contemporaneous and consistent construction of it (see pages 30-34, *infra*).

We note that nowhere in the legislative history is there a shred of evidence that, in conferring upon the Attorney General broad authority to contract with the states for "the custody, care, subsistence, education, treatment, and training" of state prisoners, Congress thought it was conferring any statutory *protection* on individual state prisoners against transfer to federal custody—to be enforced by a plethora of suits in federal courts. While such individuals were the subject of the legislation, they were not, except perhaps indirectly, its intended beneficiaries. Rather, the purpose of the statute unquestionably

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[14] The Senate passed S. 2160 on Oct. 19, 1951 (97 Cong. Rec. 13543). H.R. Rep. No. 1663 was published on Mar. 27, 1952, the House passed S. 2160 on May 5, 1952 (98 Cong. Rec. 4801), and President Truman signed it into law on May 9, 1952 (98 Cong. Rec. 4967).

was to benefit the state and federal prison systems by allowing for transfers of prisoners between them on a reciprocal basis, pursuant to contract.

Finally, even supposing that the legislative history of Section 5003 reflects Congress's expectation that, notwithstanding the broadly worded authorization contained in the language of the statute, the authority would be used solely for a narrow class of individuals with specialized treatment needs, it does not follow that a litigative remedy is necessary or appropriate to enforce such expectations or that Congress intended to make transfers for purposes other than "treatment" unlawful. Whatever views Congress may have had with regard to the possibility of creating a "national" prison system (see Pet. Br. 9, 45-46), the mechanisms for dealing with such questions are, first, the exercise of sound discretion by the Attorney General and, second, Congressional oversight and legislative revision in the event it is concluded that the contracting power is being abused.[15]

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[15] Section 5003 was amended in 1965 by the addition of subsection (d), which permitted the transfer of United States citizens incarcerated in the Panama Canal Zone Penitentiary to federal institutions in the continental United States. Pub. L. No. 89-267, 79 Stat. 990.

More recently, the Senate Committee on the Judiciary, which was considering a comprehensive revision of the United States Criminal Code, proposed that Section 5003(a) be replaced with the following provision, from which any reference to "treatment" or "treatment facilities" is omitted:

> The Director [of the Bureau of Prisons] may contract with the proper authorities of a State, territory, or locality, or, at the request of the tribal leaders, with an Indian tribe, for the official detention, including safekeeping, care, subsistence, correctional programs, and employment, in a federal penal or correctional facility, of a person convicted of an offense in a court of such State or territory or Indian tribe, if

C. The Bureau's Contemporaneous and Consistent Construction of the Statute Has Been that No Individualized Treatment Need Must Be Shown as a Precondition to a Transfer

The question in this case concerns the scope of the authority conferred by Congress upon the Attorney General to contract for and receive custody of state prisoners. That authority has now been exercised by the Bureau of Prisons for nearly 30 years. It is well settled that

> [w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the [agency's interpretation] we need not find that its construction is the

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the Director finds that proper and adequate penal or correctional facilities and personnel are available.

S. 1772, 96th Cong., 1st Sess. § 573(b) (1979). S. 1722 was reported favorably by the Committee on Jan. 17, 1980. The Committee Report that accompanied the bill gave no explanation for the deletion of the "treatment" language. S. Rep. No. 96-553, 96th Cong., 2d Sess. 1223 (1980).

Thereafter, the House Committee on the Judiciary reported to the full House of Representatives its recommended revisions of the Criminal Code. Included in that bill was a substantial reenactment of the current Section 5008(a). H.R. 6915, 96th Cong., 2d Sess. § 3918(a) (1980). The Committee Report accompanying the bill noted the conflict between, on the one hand, the decision below and *Sisbarro* v. *Warden*, 592 F.2d 1 (1st Cir.), cert. denied 444 U.S. 849 (1979), and, on the other hand, *Lono* v. *Fenton*, 581 F. 2d 645 (7th Cir. 1978) (en banc), but "express[ed] no views concerning the correctness of cases construing the current law." H.R. Rep. No. 96-1396, 96th Cong., 2d Sess. 480 (1980). Neither S. 1722 nor H.R. 6915 passed its respective house before the 96th Congress adjourned.

> only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." * * * "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' "

Udall v. *Tallman*, 380 U.S. 1, 16 (1965) (citations omitted). See also *E.I. DuPont DeNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977). And where, as here, it was the agency (the Bureau) that suggested the statute's enactment to Congress (H.R. Rep. No. 1663, *supra*, at 2), deference is even more clearly in order. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 539 (1940).

Contrary to petitioner's suggestion (Br. 33-37), the Bureau contemporaneously construed 18 U.S.C. 5003(a) as placing no restrictions on the purposes for which a state prisoner could be transferred to the federal system; simple custody was deemed a sufficient reason. In its *1952 Annual Report* (at 16-17; emphasis supplied),[16] the Bureau of Prisons described the then new statute as follows:

> [It] authorize[s] the Attorney General, when adequate facilities and personnel are available, to contract with State officials for the care and custody of State prisoners. The act provides that any such contract should provide for reimbursing the United States in full for all costs or other expenses involved.

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[16] We are lodging ten photocopies of the *1952 Annual Report* of the Bureau of Prisons with the Court and have served copies on petitioner and respondent Ciuros.

> The confinement of Federal prisoners in State institutions has been authorized since 1776. In fact, until near the turn of the present century most persons sentenced to imprisonment by United States courts were boarded in State prisons. The present act affords an opportunity for reciprocity which had not hitherto existed. While it is not anticipated that the new statute will be used widely,[17] States may on occasion wish to request Federal care for particular prisoners who need facilities available in the Federal prison system but not in their own. *For example, a State may wish to transfer a vicious intractable offender who cannot be handled readily in its own institutions, or a female prisoner for whom appropriate facilities are not available,* or a prisoner needing special medical or psychiatric care.

Thus, at the time 18 U.S.C. 5003(a) was enacted, the Bureau contemplated that it would accept custody of state transferees for purposes ranging from medical or psychiatric care to maximum security or even simple custody. The Bureau advises us that it has adhered to its initial interpretation of the

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[17] As of December 31, 1980, only 836 of the approximately 24,000 prisoners in the federal system were state transferees. There are presently approximately 300,000 prisoners in state penal institutions and an additional 200,000 in local jails. No breakdown is available showing the proportions of the 836 transferees who have been transferred for specialized "treatment" purposes, for provision of adequate high-security incarceration, or for simple custody. Figures are available showing the number of state transferees who are being held in maximum security federal facilities (see pages 35-36, *infra*), but some of them may have been transferred at least in part for other "treatment" purposes.

statute, accepting custody of state prisoners under Section 5003(a) contracts without requiring the state to show the existence of any specialized "treatment" need.[18] As petitioner points out (Br. 4), "[t]he Bureau normally accepts all prisoners referred to

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[18] We have reviewed a number of the Section 5003 contracts entered into over the years between the federal government and various states and territories. Most recite that the state has requested permission to transfer one or more prisoners to the federal system and that the Director has certified that "facilities" are available, and provide that the state shall submit a separate application for each individual proposed for transfer (as is required under the Vermont contract with respect to transfers in excess of 40 prisoners, the number the federal government agreed in advance to take under the contract; see J.A. 11). These contracts make no mention of "treatment facilities" and refer to "treatment" only in stating that the federal government "will undertake the custody, care and treatment" of state prisoners and that the state will defend lawsuits involving their "custody, care, subsistence and treatment."

We have found two contracts—one with Alaska in 1960 (since superseded) and one with the Virgin Islands in 1966—that depart from this format and state that the Director shall assume custody if he certifies "that proper and adequate treatment facilities and personnel are available for the custody, care, subsistence, education, treatment, and training of such prisoner." Because of the age of these two contracts, the Bureau is unable to inform us of the reason for their atypical content. The practice in all cases, as far as the Bureau is aware, has been to consider treatment needs, if any, not as a precondition to accepting a transfer, but only as part of the classification process whereby a prisoner is assigned to a particular institution. Whatever the explanation for these two isolated departures from the standard contract format, they do not undermine the force of the fact that the Bureau has consistently understood and applied the statute to authorize transfer without a showing by the state of a particularized need for medical treatment or the like on the part of an individual transferee.

it * * *." That contemporaneous and consistent construction by the agency that suggested the statute's enactment and is charged with its enforcement is entitled to great deference.

D. To Construe the Statute as Petitioner Suggests Would Frustrate its Underlying Purpose by Preventing the Federal Government from Providing Needed Assistance to the States

As we have shown above, Section 5003 was designed as a reciprocal measure to the broad existing statutory authority permitting transfer of federal prisoners to state custody. The intent was to aid the effective and economical operation of both state and federal prison systems. If petitioner's construction of the statute is correct, however, the federal government is without authority to accept custody of state prisoners, no matter how beneficial such action would be to the state prison system or indeed to the prisoner himself, unless the transferee can be shown to have a narrowly defined need for specialized "treament." This cramped construction of the Attorney General's contracting authority has significant detrimental consequences.

For example, in those cases in which a determination of a need for specialized treatment could not be made, a state inmate who could benefit from other aspects of federal incarceration would be precluded from transfer. As the court below put it (J.A. 44), "[a]dopting [petitioner's] view of the statute would mean that a wholly incorrigible or, on the other hand, fully rehabilitated prisoner, incarcerated not for treatment, but solely for purposes of deterrence, could not be transferred from state to federal custody

solely to take advantage of training and educational opportunities available only at federal facilities. Nothing in the legislative history of 18 U.S.C. 5003 suggests such a distinction between prisoners incarcerated for purposes of reform and those incarcerated for deterrence or other purposes."

Another untoward consequence of petitioner's restrictive construction of the statute is that the federal government would be precluded from affording protective custody to a state prisoner who was in danger from his fellow state inmates, in the absence of a showing that the state prisoner was otherwise in need of "specialized treatment" available only in the federal system.

Vermont is not unique among the states in its need for maximum security or other federal facilities for its inmates. As of December 31, 1980, the Bureau of Prisons had contracts with 44 states or territories pursuant to which 836 state or territorial prisoners were being held in federal custody. The largest state contingent was 172 prisoners from New Mexico, most of whom had been transferred as a result of the massive disruption in the New Mexico State Penitentiary on February 2 and 3, 1980. Similarly, as a result of riots in Idaho's maximum security penitentiary on July 23, 1980, the Bureau of Prisons agreed to the Governor of Idaho's request that it assume custody of 111 Idaho prisoners (not all of whom still remain in the federal system). Of the 836 state and territorial prisoners, 343 are confined in institutions rated security level 5 or 6, the two highest security levels in the federal system.[19]

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[19] Only the United States Penitentiary at Marion, Illinois, is rated security level 6. The United States penitentiaries at

This Court is well aware of the severe overcrowding problems in state and local penal institutions. See, *e.g.*, *Rhodes* v. *Chapman*, No. 80-332 (argued Mar. 2, 1981). At the time of trial in that case, the Southern Ohio Correctional Facility at Lucasville, Ohio's only maximum security penitentiary, housed approximately 38% more inmates than it was designed to hold (*Chapman* v. *Rhodes*, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977), aff'd without opinion, No. 78-3365 (6th Cir. June 6, 1980)). In a February 1, 1981 Status Report on the Courts and Prisons, the National Prison Project of the American Civil Liberties Union stated that there are 39 states or territories "in which there are existing court decrees, or pending litigation, involving the entire state prison system or the major institutions in the state and which deal with overcrowding and/or the total conditions of confinement." [20]

In mid-December 1980 the entire federal system was actually slightly short of its rated physical capacity. See Memorandum for the United States as Amicus Curiae filed in *Rhodes* v. *Chapman*, *supra*, at chart III.[21] To the extent that such surplus facilities can be used to alleviate the states' problems, whether they be lack of maximum security facilities, lack of treatment programs or overcrowding in general, the purposes of Section 5003 would be furthered.

Leavenworth, Kansas, Lewisburg, Pennsylvania, and Terre Haute, Indiana, and the Federal Corrections Institution at Lompoc, California, are all rated security level 5.

[20] Overcrowding is specifically at issue in 34 of these 39 states and territories.

[21] We have served copies of our memorandum on petitioner and respondent Ciuros.

II. EVEN IF 18 U.S.C. 5003(a) CONDITIONS STATE-TO-FEDERAL TRANSFERS ON A PRISONER'S NEED FOR TREATMENT AVAILABLE ONLY IN THE FEDERAL SYSTEM, PETITIONER IS PROPERLY IN FEDERAL CUSTODY ON THE BASIS OF HIS NEED FOR MAXIMUM SECURITY INCARCERATION

Even if the statute read as petitioner urges this Court to construe it—that no state prisoner may be transferred to the federal prison system unless he needs specialized treatment available only in the federal prison system—petitioner nonetheless would not be entitled to relief. If need for "treatment" is a precondition to exercise of the contracting authority in Section 5003, the concept of "treatment" should be construed broadly to include the provision of maximum security incarceration facilities offering programs appropriate for long term custodial confinement, where the state is unable to provide such facilities and proper treatment of the particular inmate requires them.[22]

We deal with this issue briefly here, both because much of what we have already said supports our argument but does not require repetition, and because it is one on which the circuits are not divided. Even the Seventh Circuit, which alone supports petitioner's primary submission that the federal authority to accept custody of state prisoners is limited to individuals who are in need of "treatment" (*Anthony* v. *Wilkinson*, Nos. 79-2362, etc. (Dec. 23, 1980), petition for cert. pending *sub nom. Hawaii*

[22] We note that even in the cases of prisoners whose transfers are prompted solely by security needs, it is nevertheless true that "adequate treatment facilities and personnel are available" in the event the prisoner should need medical, psychiatric, or similar narrowly defined "treatment."

v. *Mederios*, No. 80-1315 (filed Feb. 4, 1981); *Lono* v. *Fenton*, 581 F.2d 645 (1978) (en banc)), includes within the definition of "treatment" security and protective custody, where accompanied by a sufficient array of programs.

While the question was not raised in *Lono* v. *Fenton*, *supra*, in *Anthony* v. *Wilkinson*, *supra*, the Seventh Circuit summarized its views as follows (slip op. 19):

> We think that even something so far removed from traditional notions of "treatment" as high security incarceration, with the opportunity to participate in attendant religious, educational, recreational and other programs, in particular cases may satisfy § 5003. We can perceive these conditions as meeting "some special treatment need with which the state required assistance." *Lono* v. *Fenton*, 481 F.2d at 648. Nothing in *Lono* precludes such a relatively broad construction of "specialized treatment."

More broadly, and in view of the cases before it that involved transfers for protective custody as well as for maximum security incarceration (see *Anthony* v. *Wilkinson*, *supra*, slip op. 6 n.5 (appellee Killary), 8 n.8 (appellee McKay)), the *Anthony* court endorsed transfers that "were for security and related reasons * * *" (Slip op. 15).

The Congress that passed Section 5003 legislated during an era in which paramount emphasis was placed upon the rehabilitative objectives of the correctional system. It is most reasonable to conclude that the educational, training, and counseling programs provided inmates of federal penitentiaries were considered to be embraced within the concept of "treatment" employed in the rehabilitative process even for dangerous offenders in maximum security

custody. A construction of the word "treatment," as used in 18 U.S.C. 5003(a), that includes maximum security incarceration and protective custody also comports with the Bureau's contemporaneous and consistent construction of the statute. As noted above (page 32, *supra*), in its *1952 Annual Report*, in describing the then new statute, the Bureau suggested as an example of the situations to which Section 5003 would be applicable a case where "a State may wish to transfer a vicious intractable offender who cannot be handled readily in its own institutions * * *." From that time to the present, the Bureau consistently has contracted under Section 5003 for the receipt of state prisoners in need of maximum security incarceration or protective custody. It is well settled that such a "construction of a statute by those charged with its execution should be followed unless there are compelling indications it is wrong * * *." *E.I. DuPont DeNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Accordingly, petitioner's transfer to federal custody, which could provide maximum security as well as a broad range of other programs (see note 12, *supra*), was entirely proper.[23]

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[23] The district court found (J.A. 33; emphasis added): "As a resident in a federal maximum security penitentiary, [petitioner] had the same complete freedom of movement within the institution as the other prisoners. At St. Albans, [petitioner] did not enjoy this freedom of movement within the institution and was more or less confined to D [the maximum security] wing. The programs at St. Albans, however, were substantially similar to those at the federal institutions *although somewhat less accessible to [petitioner] because of restrictions on his ability to move about the St. Albans Facility.*"

III. EVEN ASSUMING THAT SECTION 5003(a) CREATES A LIBERTY INTEREST IN A STATE PRISONER IN NOT BEING TRANSFERRED TO THE FEDERAL PRISON SYSTEM EXCEPT FOR THE PURPOSE OF TREATMENT, PETITIONER HAS RECEIVED ANY PROCESS THAT WAS DUE HIM

For the reasons stated in Part I above, we submit that 18 U.S.C. 5003(a) is an unconditioned grant of authority to the Attorney General to contract with the states for the custody of state prisoners and, accordingly, creates no liberty interest in a state prisoner in not being transferred to federal custody.[24] Even as-

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[24] In *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), this Court held that a state prisoner has no liberty interest in not being transferred to another state prison, the conditions of which are substantially less favorable to him, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other specific events. Petitioner apparently agrees with us that the *Meachum-Montanye* rationale applies with equal force to state-to-federal transfers, since the sole basis for petitioner's asserted liberty interest is 18 U.S.C. 4001 and 5003 (Br. 27-29, 43). Arguably, petitioner also could have premised a liberty interest on Vt. Stat. Ann. tit. 28, § 706(a) (Cum. Supp. 1980), which authorizes the transfer of a Vermont inmate to a federal correctional facility when, in the opinion of the Commissioner of Corrections of the State of Vermont, (a) the inmate needs particular treatment or special facilities available at the federal correctional facility, (b) all in-state treatment and rehabilitative programs available for the inmate have been considered and found unsuitable, (c) all in-state security and custody alternatives for the inmate have been considered and found unsuitable, or (d) the inmate voluntarily requests transfer. Petitioner presumably does not make that argument because he recognizes that the Vermont state procedure (described *infra*) afforded him all the process he was due in connection with any liberty interest created by the state statute.

Amici Family & Friends of Prisoners, Inc., Criminal Justice Program of the New England Regional Office of the

suming, however, that Section 5003(a) does create a liberty interest in a state prisoner not to be transferred to federal custody except for the purpose of treatment, petitioner has received any process that was due him.

American Friends Service Committee, and Massachusetts Senator Jack H. Backman assert an independent constitutional right in "family integrity," the existence of which, they claim (Amici Br. 33), "does not depend on whether or not there is a relevant federal or state statute creating an entitlement or a legitimate expectation to stay in one state prison rather than another." But the impairment of the integral family unit is an inescapable concomitance of conviction and incarceration. To argue that state defendants have a right not to have that consequence of conviction aggravated by transfer to a distant federal prison is to assume that state prisoners are afforded a constitutional right not afforded to federal prisoners, who, by statute, can be assigned and transferred to any federal institution in the country. 18 U.S.C. 4082(b). Cf. *Meachum* v. *Fano, supra; Montanye* v. *Haymes, supra.*

Amici also assert (Amici Br. 40) a liberty interest in access to the courts, which, they argue, will be denied by transfer from state to federal custody. On the facts of the present case, however, amici's claim is unfounded. The Supreme Court of Vermont has noted (*In re Morse,* 138 Vt. 327, 329 n.1, 415 A.2d 232, 232-233 n.1 (1980)) that Vermont offenders who are transferred to federal institutions remain entitled to representation by the Vermont Public Defender's Office under Vt. Stat. Ann. tit. 13, § 5232(2) (Cum. Supp. 1977). See also *Battick* v. *Stoneman,* 421 F. Supp. 213, 230 (D. Vt. 1976). Nor is there merit to amici's claim (Amici Br. 40) of insufficient access to legal materials. See *Hohman* v. *Hogan,* 458 F. Supp. 669 (D. Vt. 1978).

Finally, amici claim (Amici Br. 18) that the transfer of a state prisoner to federal custody violates the Eighth Amendment. Petitioner has never raised this claim (see *Knetsch* v. *United States,* 364 U.S. 361, 370 (1960)), and, in any event, it is frivolous.

Petitioner contends (Br. 26-29) and the Seventh Circuit has held (*Anthony* v. *Wilkinson*, *supra*, slip op. 19-31), that the *federal government* owes a state prisoner scheduled for transfer to the federal system the same amount of process that is due a parolee whose parole is sought to be revoked (*Morrissey* v. *Brewer*, 408 U.S. 471 (1972)) or a state prisoner whose transfer to a mental institution is sought (*Vitek* v. *Jones*, 445 U.S. 480 (1980)). There is no merit to this claim.[25]

In *Morrissey*, this Court held that because "the liberty of a parolee * * * includes many of the core values of unqualified liberty" (408 U.S. at 482) and because revocation of parole is lawful only when a violation of parole conditions has in fact occurred (*id.* at 480), parole cannot be revoked in the absence

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[25] We note that petitioner did not raise, nor did either of the courts below rule on, the due process issue. Accordingly, this Court need not reach this issue. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Nor do we view the due process issue as "fairly included" in the question set forth in the petition. Rule 21.1(a) of the Rules of the Supreme Court. See *Lawn* v. *United States*, *supra*, 355 U.S. at 363 n.16.

In our view, as set forth above, 18 U.S.C. 5003(a) is an unconditional grant of authority to the Attorney General to contract with the states for the custody of state prisoners. Accordingly, we submit, the statute creates no liberty interest implicating the Due Process Clause. If the Court disagrees with that primary submission, however, it may wish to reach the due process issue in the interest of judicial economy, since the issue is presented in other petitions presently pending. See *Hawaii* v. *Mederios*, No. 80-1315 (filed Feb. 4, 1981); *Beshaw* v. *Fenton*, No. 80-6354 (filed Mar. 13, 1981).

of written notice to the parolee of the claimed violation of parole, disclosure of the evidence against him, an opportunity for him to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a "neutral and detached" hearing body, and a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole (*id.* at 489).[26] In *Vitek* v. *Jones*, 445 U.S. 480 (1980), the Court held that a prisoner scheduled for involuntary transfer to a state mental hospital for treatment of a mental disease or defect was entitled to the same procedural safeguards because the liberty interest in avoiding confinement in a mental hospital was not extinguished by the criminal conviction and because "[t]he interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is * * * powerful * * * and * * * the risk of error in making the determination[] [of mental disease or defect] is substantial * * *" (*id.* at 495).

This Court has required fewer procedural safeguards where the deprivation to the prisoner is less severe, where the interest of the state is more substantial, or where additional procedures would not materially decrease the risk of an erroneous determination of the facts upon which the government's power to act is conditioned. See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979) (in view of Nebraska's "necessarily subjective * * * and predictive * * *" (*id.* at 13) discretionary parole release determinations, due process is satisfied by affording

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[26] In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), applying *Morrissey* to probation revocation proceedings, the Court held that whether due process also requires the appointment of counsel is to be decided on a case-by-case basis.

the inmate an opportunity to be heard and advising him, if parole is denied, in what respects he fell short of qualifying); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (prison disciplinary proceedings that may result in the loss of good time must be preceded by at least 24-hours' advance written notice of the claimed violation, must be followed by a written statement of the factfinders as to the evidence relied upon and the reason for the disciplinary action taken, and must permit the inmate to call witnesses and present documentary evidence in his defense "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (*id.* at 566), but need not permit the inmate to confront and cross-examine the witnesses against him nor, under usual circumstances, permit the assistance of retained or assigned counsel). See generally *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

In sum, "due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, 442 U.S. at 12, quoting *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481. Whatever process, if any, petitioner's particular situation demanded, he was afforded it, and more.

The loss suffered by petitioner in this case is substantially less severe than those suffered by the prisoners in *Morrissey* and *Vitek*. For petitioner, it is not a question whether he will remain incarcerated or live outside the walls. Nor is it the difference between penal incarceration and involuntary commitment in a mental institution. Rather, for petitioner, it is an increment in the separation from family and friends that is already an inevitable concomitance of conviction and incarceration. Indeed, it is no more than what may be suffered by any federal prisoner, all of

whom are subject to incarceration anywhere in the country. 18 U.S.C. 4082(b). Of course, "[i]t is the policy of the Federal Prison System to assign inmates [federal and state offenders alike] to an appropriate facility closest to the area of anticipated release. To the degree possible the person shall be designated to that Bureau facility which has the appropriate security features *and* is closest to the inmate's release residence." Federal Prison System, U.S. Department of Justice, *Program Statement* 5100.1 CN-2 § 3, at 2 (July 14, 1980) (emphasis in original). There is no suggestion that petitioner was not assigned on the same basis as any similarly situated federal prisoner would be.

In view of the nature of petitioner's interest, the process he was afforded was more than sufficient to preclude any undue risk of his being deprived of that interest erroneously. As described above (pages 4-5, *supra*), pursuant to Vermont Department of Corrections Policy No. 891 (J.A. 14-18), the Vermont Department of Corrections held a hearing to determine whether petitioner should be transferred to an out-of-state institution. Petitioner was afforded six days' advance notice of the hearing and of the reasons for the proposed transfer. He appeared at the hearing and was represented by lay counsel, who submitted various items of evidence in opposition to the proposed transfer. As a result of the hearing, petitioner's out-of-state transfer was recommended both because "[a]ll in-state treatment and rehabilitative programs available for [petitioner] have been considered and determined unsuitable" and because "[a]ll in-state alternatives in the area of security have been considered and found unsuitable for providing the required degree of security or protective custody for [petitioner] * * *" (J.A. 22). Thereafter, the Federal Bureau of Prisons "programmed petitioner into [its] system

by the same criteria used for federal prisoners, *i.e.*, custody and general rehabilitation considerations" (Pet. Br. 27).

By this procedure, Vermont, the entity with the most information concerning petitioner's needs and its own capacities, made a determination of those factors in a procedural setting satisfying at least the *Wolff* standards (and, indeed, the *Morrissey* standards, except for the apparent failure to allow petitioner an opportunity to cross-examine and confront witnesses; see *Anthony* v. *Wilkinson*, *supra*, slip op. 28 n.25). Thereafter, the Director of the Bureau of Prisons determined the question as to which he was the most informed, that is, whether the Bureau had the maximum security facilities to accommodate petitioner. But that type of determination called for no hearing—indeed, for no input from petitioner at all. Moreover, petitioner's suggestion (Br. 26-29), in line with the *Anthony* court's holding (slip op. 26-30), that the Director should have duplicated the state's inquiry into whether petitioner needed maximum security incarceration and whether the state could afford him such treatment not only has no basis in the statutory language (which requires the Director only to certify whether federal facilities are available), but also would have been wasteful in light of the inquiry already conducted by Vermont and would have increased the likelihood of an erroneous determination, since those are the areas with which the Director is least familiar.[27] In sum, whatever process, if

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[27] We additionally note that requiring the Director to make an independent determination whether the state prison system can satisfy the needs of its inmates would constitute a serious federal intrusion into an area traditionally relegated to state law. As this Court frequently has recognized, the internal administration of state prisons is a matter of utmost concern to the individual states. See, *e.g.*, *Meachum* v. *Fano*,

any, may have been due petitioner, it was exceeded by the extensive procedures afforded him by the State of Vermont and the Director's certification that federal facilities were available.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1981

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supra, 427 U.S. at 228-229 ("[h]olding that [intra-state transfers of prisoners not conditioned by state law or practice on proof of serious misconduct or other specific events] are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the states"); *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-492 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations and procedures, than the administration of its prisons").

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No. 80-5392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, SR., *Petitioner,*

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES,

NORMAN CARLSON, DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS, AND

WILLIAM CIUROS, JR., COMMISSIONER OF CORRECTIONS, STATE OF VERMONT, *Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

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To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

This Reply Brief addresses arguments set forth in Point I of the Brief for the Federal Respondents and also sections of the Brief for Respondent Ciuros.

1. The Petitioner has a Private Right of Action Under 18 U.S.C. §4001(a) to Challenge his Unlawful Confinement in Federal Prison.

Throughout this litigation the respondents argued only the merits.[1] Even in this Court the government's three

[1] The government's statement of the issue to the Second Circuit (p. 3 of its Second Circuit brief) asked whether "the requirements of 18 U.S.C. §5003 are satisfied when the United States Bureau of

Questions Presented (Br. i) address the substantive scope of 18 U.S.C. §5003 and the derivative procedural issue. Now for the first time the government contends (Br. 18-23) that petitioner lacked standing to sue. He had, the government says, no "individualized" cause of action and thus can not be heard to complain that he is held illegally in federal prison. If this contention is correct, it makes no difference whether or not he is held illegally.

To be sure, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago,* 440 U.S. 677, 688 (1979), citing *Cort* v. *Ash,* 442 U.S. 66 (1975). The government concedes (Br. 18) that statutes cast in an "individualized 'no person' formulation" can create private rights of action, and indeed they almost invariably do. *Cannon,* at 691 n.13. Such a statute is 18 U.S.C. §4001(a), which expressly guarantees that

> *No citizen shall be imprisoned* or otherwise detained *by the United States* except pursuant to an Act of Congress.

Prisons certifies that appropriate correctional facilities exist within the federal system for the accommodation of state prisoners." The argument in that brief addressed that issue. Similarly, in its brief in response to our petition for certiorari the government put the question as "[w]hether 18 U.S.C. [§] 5003 conditions the power of federal authorities to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system."

Cort v. *Ash* sets forth a four part standard which this statute indubitably meets: 1) It creates a federal right in all citizens against federal imprisonment by executive order or arrangement without legislative mandate. 2) There seems to be no explicit evidence of legislative intent to create a private action but such evidence is not necessary. *Cort* at 82. 3) Finding a private right of action is fully consistent with the legislative purpose. The only other agent likely to police this limitation on the Attorney General's power is the Attorney General himself. 4) The lawfulness of federal imprisonment is a concern of the federal courts and is not "an area basically the concern of the States . . ." Cort at 78.

Petitioner therefore has standing to claim that he has been imprisoned by the United States not pursuant to an Act of Congress. The validity of that claim depends on the scope of §5003. The merits are properly before the Court.[2]

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[2] Section 4001(a)'s overarching ban on unauthorized imprisonment is not mentioned in the government's argument on standing. In a later footnote (Br. 25 n. 13) the government asserts that the statute does not even apply to the petitioner because he has been convicted of a crime. This contention is belied by the plain and unambiguous language of §4001(a) ("No citizen . . ."). It finds no support in the legislative history. The statute was passed to "restrict the imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists." H.R. Rep. No. 92-116, 92d Cong., 1st Sess., quoted in 1971 U.S. Code Cong. & Admin. News 1435. The Department of Justice offered an amendment to the proposed bill, which the Committee and Congress adopted, to assure that no *federal* convict should be covered by the general ban on federal imprisonment. The Department thus recognized at that time that §4001(a) applied by its terms to convicts and non-convicts alike. Id. at 1437.

2. The Bureau's Certification of Available "Facilities" does not Block Inquiry into the Legality of Petitioner's Confinement.

In a similar vein the government next argues (Br. 20-23) that the administrative certification of "facilities" is dispositive and therefore the scope of §5003's authorization is not open to question by a transferred inmate.

The subject matter of certification under §5003 is "treatment facilities and personnel," and we argue that the statute looks to enrollment of state prisoners in such treatment facilities. The government has not disputed this construction, and indeed to do so would render the entire certification clause meaningless. The government focuses instead on the purpose of certification and the manner in which it is carried out, arguing that the requirement was merely "an internal agency housekeeping measure" designed to assure that room is available for state prisoners; that the measure is probably superfluous since the Attorney General has delegated his contracting authority to the Director of the Bureau of Prisons; that contracts pursuant to certification may be made for "groups of prisoners"; and that such certification is unreviewable. Presumably, if the statute required certification of appropriate "hospitals" and the transferee were sent to a certified dungeon, the government would claim full compliance with the law so long as the certification had been made in the statutory language.

In the analogous situation of Youth Corrections Act certifications and placements, courts have inquired into substance, not form. Thus, *Robinson* v. *United States*, 474 F.2d 1085, 1091 (10th Cir. 1973) relied on by the govern-

ment (Br. 22 n.11) held that there need not be individual certifications of YCA facilities. But where individual facilities are shown not to be "treatment facilities" in fact courts have given relief. E.g. *Harvin* v. *United States*, 445 F.2d 675 (D.C. 1971) and cases cited at p. 32 of our main brief.

In any event the formal argument does not advance the government's case on the facts presented. The certification here was not in the statutory language; the Director has not certified the availability of "proper and adequate treatment facilities and personnel," but only that prison facilities are available.[3] J.A. 10. If there is, as we argue, a significant difference between the two, the certification is facially defective. If "treatment facilities" is a euphemistic or figurative expression for prisons, as the government contends, the certification is facially correct even though not in the words of the statute. Thus, even if the court agrees that it should not "look behind the face of the certification" (Br. 21), the question of the statute's scope must be decided.

The government's argument that certification need not be made on a case-by-case basis (Br. 20-21) also misses the point. Elsewhere it concedes (Br. 16) that if "treatment facilities" means what we say it means a prisoner is entitled to an individual determination of his treatment needs as a matter of due process. The need for a case-by-case determination thus depends on the substantive

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[3] We do not concede (as the respondents suggest, Br. 14) that the formal requisites have been met.

scope of the statute; again that issue can not be sidestepped.

3. The Legislative History Conforms with the Plain Meaning of §5003(a).

a. The government calls for close analysis of the statutory language but offers none (Br. 17-18). The section at issue consists of an independent clause, concerning the scope of the contract, and a dependent clause concerning certification:

> The Attorney General*** is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence education, treatment and training of persons convicted of criminal offenses in the courts of such State or Territory***
>
> [W]hen the Director shall certify that proper and adequate treatment facilities and personnel are available***

The government reads this as if the dependent clause were omitted, arguing that "treatment" in the independent clause enjoys no "grammatical primacy," that the list "runs the gamut of penological purposes," and that the contract has other purposes than treatment. To be sure, the states must be bound to pay for all services incidentally provided.[4] None of this alters the fact that the subject of the contract is certified treatment facilities and personnel.

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[4] The full reimbursement expected from the states is explicit on the face of the statute and in the legislative history.

As noted in our main brief, the two clauses of §5003(a) are in the same words, and bear the same relation to one another, as §§5012 - 5013 in the Youth Correction Act, a coincidence of language which reinforces our contention that "treatment facilities" in §5003 does not merely mean "federal prisons."

b. The government mistakenly characterizes our construction of §5003 as requiring a pre-transfer determination that state facilities are not adequate; that proper and adequate facilities exist *only* in the federal system. Br. 15, 17, 18, 24, 37, 46. The state's brief similarly misstates our position.

The face of the statute affirmatively requires that appropriate treatment facilities be available in the federal system, but it does not by its terms require that such facilities *not* be available in the state system. The Seventh Circuit wrote in *Lono* v. *Fenton*, 581 F.2d 645 (1978) and again in *Anthony* v. *Wilkinson*, Nos. 79-2362, etc. (Dec. 23, 1980), that the absence of suitable state facilities should be a precondition for any §5003 transfer, finding ample support for this conclusion in the legislative history. We have not pressed that argument here because it is unnecessary for the decision of this case. First, the record shows beyond doubt that the express affirmative requirement of the federal statute has not been met. There may be a plethora of treatment facilities in the federal prison system, but the petitioner is not enrolled in one. Second, the absence of suitable in-state facilities is a requirement of state law. 28 V.S.A. §706(a).

The government's dismissal of the legislative history of the statute as "more concerned with explaining the

states' need for a measure such as S. 2160 than with describing the situations to which it would apply" has force only in connection with the implied negative requirement (no suitable state alternatives) which we do not contend for. But with regard to the affirmative requirement that there be adequate federal treatment facilities, the legislative history is in complete harmony with the plain language of the statute: the states lacked treatment facilities and the Congress undertook to make the Bureau's treatment facilities accessible. The statute as enacted met the states' stated needs, no more no less.

Senator McCarren's statement on the Senate floor that the statute permitted transfers "in a limited category of cases," 97 Cong. Rec. 13543 (1951) was an explanation of the scope of the Attorney General's authority. The Senator was not merely predicting that "in most cases the states would have the necessary facilities to handle their own prisoners . . .," as the government contends. Br. 27. This explanation of the statute to the Senate is of course fully consonant with the construction placed upon it in the House Committee Report.

4. There is no Conflict Between §5003(a) and §5003(c).

The government contends that our construction of the §5003(a) makes the statute internally inconsistent. United States prisoners, the government points out, can be freely transferred and classified into programs which are not treatment facilities. Section 5003(c) provides that transferred state prisoners "be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not

inconsistent with the sentence imposed." Hence, the government contends, state prisoners must also be freely transferrable.

This argument, as the Seventh Circuit noted in *Anthony,* "falls of its own weight." Slip op. 14 n.14.[5] State prisoners are transferred to treatment facilities whereas federal prisoners are committed to federal prison. Section 5003(c) was intended to assure that *within* federal treatment facilities all prisoners should be treated alike, "in order that there be no favored inmates or group of inmates." H.R. Rep. No. 1663 quoted in 1952 U.S. Code Cong. & Admin. News 1421.

CONCLUSION

For the above stated reasons and for the reasons stated in petitioner's main brief, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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[5] Vermont also argues extensively on the basis of §5003(c). Br. 15-17.

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No. 80 - 5392

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT HOWE, SR., Petitioner

V.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, et al., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE, AND BRIEF, AMICUS CURIAE, ON BEHALF OF FAMILIES & FRIENDS OF PRISONERS, INC.; CRIMINAL JUSTICE PROGRAM OF THE NEW ENGLAND REGIONAL OFFICE OF THE AMERICAN FRIENDS SERVICE COMMITTEE; AND MASSACHUSETTS STATE SENATOR JACK H. BACKMAN.

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SUPREME COURT OF THE UNITED STATES

ROBERT HOWE, SR., Petitioner	)	
V.	)	No.80-5392
WILLIAM FRENCH SMITH, et al., Respondent	)	

MOTION FOR LEAVE TO
FILE BRIEF, AMICUS CURIAE

Families & Friends of Prisoners, Inc.; the Criminal Justice Program of the New England Regional Office of the American Friends Service Committee; and Massachusetts State Senator Jack H. Backman hereby respectfully move for leave to file the attached brief, amicus curiae, supporting the position of the petitioner and urging reversal of the decision below.

Both the petitioner Howe and the Solicitor General have granted consent; but the Vermont Attorney General has refused.

Families & Friends of Prisoners, Inc. is a non-profit Massachusetts cor-

poration organized to provide support to, and to further the interests of, prisoners and those who have friends or relatives in prison. The Criminal Justice Program is a staff and membership unit of AFSC which seeks to secure the right of prisoners to fair and humane treatment. Senator Backman, who has had a long-time interest in prison issues, is the Senate Chairman of the Joint Committee on Human Services and Elderly Affairs, which has jurisdiction of legislation affecting state prisons in the Commonwealth of Massachusetts.

Based on proposed amici's counsel's reading of the opinion below (625 F.2d 454), his conversations with counsel for the petitioner and the letter he received from counsel for the State of Vermont refusing to consent to the filing of such a brief, the proposed amici believe that the only facts before the Court will be those relating to petitioner Howe's own interstate transfer, and that the sole issue of law presented by the parties will be one of statutory construction.

The proposed amici have watched with

acute concern the growth in Massachusetts of the practice of shipping prisoners into the federal system, apparently without substantive standards as to who should be shipped and wholly without procedural protections of any kind. They believe this Court should not decide this case, which brings this "shipout" policy before the Court for the first time, without being made aware of the horrendous facts of shipouts and having a chance to consider the practice in light of its historical precursors and the Eighth Amendment ban against cruel and unusual punishment, as well as the Fourteenth Amendment's protections of both family integrity and a prisoner's access to the courts. The proffered brief sets forth some of the facts and makes a brief argument on the constitutional issues.

Accordingly, the proposed amici urge that Court grant leave to file the within brief.

Respectfully submitted,

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No. 80 - 5392

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT HOWE, SR., Petitioner

V.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, et al., Respondents

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SUMMARY OF ARGUMENT

A. Amici contend that shipping a state prisoner against his will across state lines into the federal system is cruel and unusual punishment prohibited by the Eighth Amendment. The analysis looks to not only the actual practice and effect of such shipouts but also the pre-Revolutionary English and American experience with what was then known as "Transportation." Starting with the English Habeas Corpus Act of 1679, exiling of convicts beyond the jurisdiction of the sentencing court was prohibited, and these prohibitions were mirrored in the colonial statutes and finally in some constitutional provisions as the colonies and territories became states. Many states still have such anti-transport passages in their law. Accordingly, amici argue that the "evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles, 356 U.S. 86, 101) had, by the mid-19th century, eliminated an obnoxious and cruel

practice which only recently has emerged again in our justice system.

B. Amici argue as well that forced shipouts of state prisoners into the federal system offends the due process clause of the Fourteenth Amendment in two respects. First, a shipout separates a prisoner from his family -- and the family from the prisoner -- thus fracturing the residuum of family integrity which conviction and imprisonment have left them. Amici argue (relying principally on Stanley v. Illinois, 405 U.S. 645, Procunier v. Martinez, 416 U.S. 396, and Vitek v. Jones, 45 U.S. 480) that this cannot be done constitutionally without affording the prisoner procedural safeguards and a demonstration of a compelling state interest.

Second, amici point to the horrendous effects that an interstate shipout can have on a prisoner's right of access to the courts (Bounds v. Smith, 430 U.S. 817) and urge that if the practice is not invalidated altogether, it be at least circumscribed by procedural due process and a showing of a compelling

state need for transfer in the particular case.

In conclusion, amici urge that the decision below be reversed and that involuntary interstate transfer of prisoners into the federal system be held unconstitutional; or, in the alternative, that the decision below be vacated and the case remanded to the Second Circuit for full consideration of the constitutional issues involved.

I. Introduction and Statement of Interest of Amici

This amicus curiae brief, supporting the position of petitioner Howe, urging reversal of the court below, is filed on behalf of Families & Friends of Prisoners, Inc., the Criminal Justice Program of the New England Regional Office of the American Friends Service Committee and Massachusetts State Senator Jack H. Backman.

Families & Friends of Prisoners, Inc. is a non-profit Massachusetts corporation organized to provide support to, and to further the interests of, prisoners and those who have friends or relatives in prison. The Criminal Justice Program is a staff and membership unit of AFSC which seeks to secure the right of prisoners to fair and humane treatment. Senator Backman, who has had a long-time interest in prison issues, is the Senate Chairman of the Joint Committee on Human Services and Elderly Affairs, which has jurisdiction of legislation affecting state prisons in the Commonwealth of Massachusetts.

This case presents the first opportunity for the Supreme Court to consider the practice of involuntary transfer of state prisoners to geographically remote federal prisons. The practice presents serious problems, factually and legally, not raised by a transfer of an inmate to another prison within the same state and is of acute concern to the amici.

They have seen the practice used in Massachusetts with greater frequency over recent years. It is a practice which has a devastating impact on the transferred inmate as well as on the family he leaves behind. In amici's view, grave constitutional questions are posed by the transfer of state prisoners to federal prisons, questions which we believe will not be raised in the briefs of the parties but which we think merit the attention of this Court in its consideration of the present case.

II. Facts

Petitioner Robert Howe was transferred to federal prison several months after his conviction for murder in a Vermont State court. The transfer was carried out in accordance with the terms of a contract entered into between the State of Vermont and the United States. The contract is of the sort authorized by 18 U.S.C.A. §5003 which provides in relevant part:

> "(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided that any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved."

Although the Vermont Department of Corrections conducted an administrative hearing prior to the transfer, at no time did the Department or the Federal Bureau of Prisons make a determination that Howe was in need of treatment which could only be provided within the federal

system. The facts of the present case only vaguely suggest the potential for abuse and human suffering that exists when prison officials have unbridled discretion to exile state prisoners to federal prison. In Massachusetts that potential has become a reality.

In 1979, the Court of Appeals for the First Circuit in Sisbarro v. Warden, 592 F.2d 1 (1st Cir. 1979), held that prison officials need not provide notice or a hearing to state prisoners prior to a transfer to federal prison.[1/]

1/ The court held that the discretion of prison officials to transfer inmates to federal prisons or to facilites operated by other New England states, was in no way limited by the language of section 5003 or by other relevant state legislation. The court concluded that since discretion was unlimited the inmate had no right to procedural protection, relying on Meachum v. Fano, 427 U.S. 215 (1976).

The court observed that out-of-state transfer might well result in "substantial interference with communication and visitation, and that [the inmate's] access to legal materials and lawyers of the state in which he was convicted may be diminished" but nonetheless concluded that for purposes of due process analysis, there is no distinction between interstate and intrastate transfer. 592 F.2d, at 3. The amici agree with the observation, but not the conclusion.

During the period since the First Circuit decision in Sisbarro, transfers of Massachusetts inmates to remote federal prisons have occurred with disturbing frequency. These transfers have been carried out without giving the affected individuals notice, hearing or even an explanation for the action taken.

The above information comes from a staff report received by one of the amici, Senator Backman, from his assistant, S. Brian Willson, in early February 1981. The report is attached to this brief as Appendix A, and is referred to hereafter as simply the "Willson Report."

Senator Backman directed a Human Services Committee staff inquiry into the prisoner shipouts as a result of being contacted by the wives and parents of a number of the transferred prisoners who had been unable to obtain adequate information from the Massachusetts Department of Correction and who were concerned that the transfers were politically motivated. Senator Backman's staff distributed questionnaires to recently transferred prisoners and prepared a report for the Committee based

on their responses.

The results of the survey are alarming in that they strongly suggest that the transfers have been consciously used by prison officials to sabotage pending litigation against the Department.

Of the nineteen men[2] surveyed, thirteen had civil lawsuits pending against the Department. A fourteenth was in the process of drafting a complaint at the time of transfer. The Willson Report suggests that since the transfers were apparently not carried out for legitimate security[3] or disciplinary purposes,[4] they were used by prison officials to silence their most active and vocal in-prison critics. It does

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[2] Three of the 19 prisoners surveyed had been transferred to prisons in other states under the New England Interstate Corrections Compact. Mass. General Laws, Chapter 125, Appendix.

[3] Walpole prison, from which all the inmates were transferred, is a high security facility, yet just before transfer, 11 of the 19 men were in <u>minimum</u> security blocks.

[4] Seven of the 19 men had not received disciplinary 'tickets' for alleged rule violations during the six months prior to the transfer and virtually all of the tickets of those who did were for minor non-violent infractions.

not take much imagination to appreciate the chilling effect of the State's practice on the exercise of protected rights by those who remain in the state prison. Having witnessed the expulsion of inmates who posed neither disciplinary nor security problems, but who openly challenged prison practice, prisoners must find themselves confronted with a Hobson's choice: either they forego any efforts to vindicate their rights or they risk being exiled to a distant prison, far removed from relevant lawyers or law books, family or friends.

The relevant professional literature shows that such separation has a destructive, alienating and anti-rehabilitative effect on the transferees and can impose great hardship on the prisoners' families. Transfer has generally terminated any meaningful contact between the prisoner and his wife and children. The cost of transportation and lodging needed to visit the inmate has effectively placed him beyond the reach of his family.

The anti-rehabilitative effects of forced separation from the family are

substantial and well documented. A number of social scientists have studied the effect of family contact on parole success. The results are remarkably consistent and clearly establish that inmates who maintain family ties while in prison have a far greater chance of remaining out of prison after their release.[5/]

The wives and children of the transferred inmates also suffer substantial psychological harm. While the exact nature of the adverse effects on an inmate's child may vary with age, forced separation may result in significant

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[5/] D. Glaser, Effectiveness of a Prison and Parole System at 366 (1964). The study showed that 71% of those with active family contact were successful on parole compared to 50% who were successful without such prelease contact.

N. Holt and D. Miller, Explorations in Inmate Family Relationships (California Department of Corrections, Report No. 46, 1972). Seventy percent of those with 3 or more regular visitors were successful on parole. Those without visitors were six times more likely to re-enter prison during the first year of parole.

R. Ohlin, The Stability and Validity of Parole Experience Tables (Ph.D. thesis; University of Chicago, 1954). Of those who maintained active family contact while in prison 75% were successful on parole compared to 34% of those who did not.

emotional distress, poor social and psychological adjustment, diminished academic achievement and destruction of the parent-child bond.[6] Already strained by incarceration,[7] the marital relationship may often not be able to weather the destructive impact of an involuntary and indefinite separation.

The findings of these authors are reflected in both Bureau of Prison policy[8] and in the recommendations and standards of various organizations concerned

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[6] J. Goldstein et. al., Beyond the Best Interest of the Child, 31-34 (1973); J. Hoffman, On Prisoners and Parenting: Preserving the Tie That Binds, 87 YALE L.J. 1408, 1416-18 (1978). See also Friedman and Esseltyn, Adjustment of Children of Jail Inmates, 29 FED. PROB. 55 (Dec. 1975).

[7] See generally, Schwartz and Weintraub, The Prisoner's Wife: A Study in Crisis, 38 FED. PROB. 20, 21-24 (Dec. 1974).

[8] "The Bureau of Prisons encourages visiting by family, friends and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members in the community ." 28 C.F.R. §540.40 (1980).

with the criminal justice system.[9] As one federal judge has recently noted:

> "Virtually every statement on visitation from the American Correctional Association Manual to the State Association of Correctional Administrators (1972), every national study (e.g. the National Advisory Commission on Criminal Justice Standards & Goals) and every major textbook on corrections stresses the critical nature of visitation both in terms of the reduction of tension inside the prison and the facilitation of the ultimate rehabilitation of the prisoners by strengthening his ties with the 'free world' . . ." Ramos v. Lamm, 485 F. Supp. 122, 150 n.15 (D.Col. 1979).

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[9] See e.g. A.B.A. Standards for Criminal Justice, Legal Status of Prisoners (Ch. 23, Adopted as A.B.A. policy, February 1981).

"(a) Home furlough programs should be established...to enable prisoners to maintain and strengthen family and community ties.

(b)...[c]orrectional authorities should accommodate and encourage visiting by establishing reasonable visiting hours including time on weekends and holidays suited to the convenience of visitors.

(c)...Extended visits between prisoners and their families in suitable accommodations should be allowed for persons who are not receiving home furlough.

The Commentary notes that "[b]ecause almost all inmates will be returned to the community at the expiration of their terms, it is important to preserve wherever possible family and community ties."

Certainly, transfer also necessitates termination of the inmate's constructive involvement with any religious, educational, vocational, and therapeutic programs operating at the sending institution. Therapeutic relationships with the inmate's counselor and other staff members as well as long-standing friendships with other inmates come to an abrupt end. In short, whatever support system the inmate had established to help him survive the alienating and dehumanizing prison experience comes crashing down around him.

When he arrives at the federal prison he understandably brings a certain bitterness that cannot be expected to promote rehabilitation. He is thrust into a wholly new and unfamiliar environment which might well place him in serious personal jeopardy. It is generally accepted that the first months of incarceration constitute the most dangerous period for a prisoner. Until he is integrated into the new prison sub-society he is a tempting target for would-be extortionists, rapists and other institutional predators. It is as if he is being plunged into prison for the very first time and once again must suffer

the threats and humiliations of "the 'welcome', where staff, inmates or both go out of their way to give the recruit a clear notion of his plight."[10]

The changes transfer brings about in the inmate's personal life are accompanied by equally debilitating changes in his legal status. With his transfer to federal prison, he loses the opportunity to earn 'good-time' typically offered by State correction systems, and along with it the possibility of an earlier release.

The transferred inmate is severely disadvantaged with respect to parole determinations, because of the nature of the factors considered. His geographic isolation makes it impossible to interview with potential employers or vocational training programs. As noted, it also diminishes the possibility that he will have a stable home situation to return to. Both factors are of critical importance since a stable living situation and an occupational program are generally pre-requisites to a favorable

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[10] E. Goffman, Asylums, 14, 18-19 (1961).

parole determination.

The transferred inmate's ability to petition his State government for redress of grievances is also severely diminished. State officials cannot be expected to maintain an active interest in what is happening in a remote federal prison.

Significant also is the extent to which the transferred inmate loses access to the state courts with exclusive authority over his sentence. The inmate is severely disadvantaged with respect to any litigation pending at the time of his transfer, since transfer will generally necessitate termination of existing attorney-client relationships with obvious potential for adverse effect and prejudice.[11/]

Should the transferee be able to afford the services of an attorney in the receiving state, such an attorney is not likely to be versed in the law of the sentencing state. Moreover, such an attorney remains subject to discretionary practices of the sentencing courts which

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11/ See the Code of Professional Responsibility, E.C.2-32, which requires attorney considering termination to evaluate the potential for such effects.

could deny him an opportunity to present the case altogether. Leis v. Flynt, 439 U.S. 438 (1979) (per curiam).

The state prisoner in a remote federal prison does not have access to resources within the prison which would allow him to secure meaningful access to state courts on his own. Federal prison law libraries do not provide even the most basic state law materials, 12/ nor are they requred to under existing department policies. 13/ The Federal Bureau of Prisons simply does not undertake to provide transferred inmates access to their state courts, viewing it instead as a responsibility of the sending state. 14/

In summary, the facts of involuntary out-of-state transfer show a pervasive, anti-rehabilitative effect on the inmate and a devastating impact on his family.

12/Telephone conversation between Paul Zieff, assistant to counsel for amici, and Mr. Lloyd Hooker, Bureau of Prisons Law Librarian, Central Office, February 27, 1981.

13/U.S. Department of Justice, Federal Prison System: Inmate Legal Service(General Counsel, No. 1315.3. July 16, 1979, Attachment 1: Law Library Materials).

14/Telephone conversation between Paul Zieff and Merry Wilburn, Bureau of Prisons, General Counsel's Office, February 27, 1981.

III. Argument

A. INVOLUNTARY INTERSTATE TRANSFER OF A STATE PRISONER TO FEDERAL PRISON IS CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES THE EIGHTH AMENDMENT.

As evidenced by the studies noted above, depriving a man of his family by transporting him against his will to a distant prison is cruel. Not only cruel, it is highly unusual. It is a punishment which "has no fellow in American legislation." Weems v. United States, 217 U.S. 349, 377 (1910).

From the very birth of this nation, the punishment of those committing crimes against the Colony, and later the State, has been viewed as something which ought to take place wholly within the sentencing court's jurisdiction. This tradition has deep roots in the English common law and remains firmly embedded in the collective conscience of the American people. A brief glimpse at the historic underpinnings of this tradition is instructive and demonstrates just how "unusual" these tranfers are.

The starting point for any such analysis must be the English Habeas Corpus Act of 1679, 31 Car.II, c.2, "one of the fundamentals of English liberty."[1/] The Act specifically prohibited any transfer of a prisoner, even within the county, absent a writ of habeas corpus or some other legal writ.[2/] More to the point, the Act also flatly prohibited transport of the prisoner for confinement outside of the jurisdiction.[3/] The Habeas Corpus Act was in large part a response to, and reaction against, the practice know at the time as "transportation," whereby

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1/ A. Carpenter, Habeas Corpus in the Colonies, 8 AM. HIST. REV. 18, 21 (1902).

2/ Transfer would also be allowed in the event of fire, trial elsewhere in the county, or judicial order to a common jail. See Section IX of Act, attached to this brief as Appendix B.

3/ Section XII. "...No subject of this realm that now is or hereafter shall be an inhabitant or resiant of this Kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas. . ." See Appendix B for full text of Section XII.

convicted prisoners were removed to faraway penal colonies.[4]

The English Habeas Corpus Act was adopted either verbatim[5] or in some

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[4] The first Parliamentary authorization of transportation occurred in 1597. Political and religious prisoners were frequent transports, as the practice provided "a convenient way of ridding the country of their sedition and turbulence." W. Johnson, English Prison Hulks, 2 (1957). The Habeas Corpus Act went into partial remission in 1717 when Parliament passed 4 Geo. I, c.11 which provided for transportation as a penalty for certain offenses. Criminals were transported to Australia, Tasmania, Norfolk Island, Africa and the American colonies. F.H. Wines, Punishment and Reformation: A Study of the Penitentiary System, 163 (1910). The American colonies bitterly resented the practice. Id., at 163. The last English transport ship crossed the ocean to Western Australia in 1867, and "this system at long last came to a welcome end." R. Hinde, The British Penal System, 93 (1951). "Transportation of men against their will has always been executed at a terrific social cost." H. Barnes and N. Teeter, New Horizons in Criminology, 295 (2d ed. 1959). "[T]he annals of the practice are among the darkest stains on a supposedly civilized culture. It was one of the most repulsive phases of human activity in dealing with criminals . . . Transportation has proved a ghastly failure wherever it has been tried." Id., at 305.

[5] South Carolina, Public Laws, S.C. 330 (1712); Georgia, Digest of the Laws of Georgia 1700-1796; North Carolina, N.C. Revised Laws, 1821.

modified form,[6] by eleven of the thirteen original states. As new states joined the Union, they often incorporated anti-transportation provisions into their habeas corpus acts.[7]

As a practical matter, these anti-transportation provisions were hardly necessary to protect American prisoners. Punishment of crime was from the outset thought to be a local concern and incarceration outside of the state was not practiced.[8] It is not surprising then that a number of the explicit anti-transportation sections were dropped during pre-civil-war revisions of the habeas corpus acts.[9] Research into the

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[6] New York, N.Y. Laws of 1787, c. 39; New Jersey, Laws of New Jersey, 1795; Delaware, Del. Laws, c. 4 §10 (1793); Maryland, Laws of Md. c. 126 §5 (1809); Pennsylvania, Pa. General Laws, c. 73 §12 (1785); Virginia, Laws of Virginia, c. 53 §7 (1792); Rhode Island, Act. Laws of R.I., 1798 at 232; Massachusetts, Acts and Resolves of 1784, c. 72 §§9 and 10.

[7] E.g., Maine, Laws of Maine 1822, c. 64 §11; Vermont, Act. Vermont Laws 1814, c. 7 §25.

[8] Wines, op. cit., supra 180, n.5. See also D. Rothman, Discovery of the Asylum (1971).

[9] E.g., Mass. Revised Statutes, c. 111 §32 (1836).

history of the period suggests no reason for deletion other than the revisor's natural inclination to excise purely vestigial language.[10/] A number of states, however, have retained explicit anti-transportation language.[11/]

Accordingly, the amici argue that the

10/ Research made available to the amici suggests no other reasons. For example, a thorough study of the revision of the Massachusetts Act including contemporary newspapers and literature, concurrent legislation and court decisions, was unable to uncover a hint that repeal was the result of any legislative policy. The researchers also consulted a legal historian and an expert in American penological history: neither could suggest any reason aside from the observation that in the context of the times the provisions were not needed.

11/ E.g.
Ariz. Rev. Stat. Ann. §31-472 (1956).
Ark. Stat. Ann. §43-2607 (1977).
Cal. Penal Code §2911 (West Supp. 1970-1979).
Ga. Const. of 1877, art. I, §2-118 (1976).
Ill. Rev. Stat. c.65, § 29 (Smith-Hurd 1959) (amended 1979).
Kan. Stat. Ann. §21-4609 (1974).
Note: This provision authorizes transfers of prisoners intrastate. There is no authority for shipping prisoners out of state, but no specific prohibition.
See also Kan. Const. of 1859, Bill of Rights, §12 (1972).
Note: The original language of 1859 read:

(cont.)

(Fn. cont.)

"No person shall be transported from the state for any offense committed within the same, and no conviction in the state shall work a corruption of blood or forfeiture of estate." The amended version of 11/7/1972 reads: "No conviction within the state shall work a forfeiture of estate." However, the original intent of the Constitution may be in force, especially when examining the statutory authority given to the correctional authorities only for transferring intrastate.

Md. Ann. Code,Art.27 §618 (1976).

Neb. Const., Art.I, §15.

N.D. Cent. Code §32-22-36 (1976).

Ohio Rev. Code Ann. §2725.25

Ohio Const., Art.I, §12.

S.C. Code, §17-13-120 (1977). Note: §17-13-120 specifically prohibits transfer of prisoners ("shall not be removed... unless"). But see Vice v. Harvey, 458 F. Supp. 1031 (D. S.C. 1978), a case which amici suggest may have been wrongly decided.

S.D. Codified Laws Ann. §24-2-1; §24-2-25; §24-1-5; §24-6-4; §24-6-6 (1979). Note: These various provisions of S.D.C.L.A. specifically direct the correctional authorities who receive convicted prisoners to where they shall place them and when they may be moved to other facilities within the state. §24-1-5 authorizes the state to contract with the U.S. for support and care of U.S. prisoners within the S.D. penitentiary. There is no authorization for transfer of state prisoners to other states or to the federal government.

W. Va. Const., Art.III, §5.

practice of transportation -- or, in this modern day, the shipout policy under consideration in the instant case -- is irreconcilable with the common law tradition of this country and with what, indeed, were by the middle of the 19th century "the evolving standards of decency that mark[ed] the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The shipout policy, as practiced, is banishment, "a fate universally decried by civilized people." Trop v. Dulles, supra, at 102. Indeed, as one judge has observed:

> "To be cast outside the jurisdiction within which one was sentenced is often to be separated from rights, privileges, and standards otherwise available -- to become to some degree, a 'man without a country.'" Gomes v. Travisono, 490 F.2d 1209, 1217 (1st Cir. 1974) (Campbell, J., concurring) vacated, 418 U.S. 909, cert. den., 418 U.S. 910, aff'd as modified, 510 F.2d 537 (1974).

A man in exile at least remains free to come and go as he cares to, albeit perhaps not in the state of his choice. Yet exile has been universally condemned as an unreasonable punishment. E.g. State v. Doughtie, 237 N.C. 368; 74 S.E. 2d

922 (1953); Ex Parte Scarborough, 76 Cal. App.2d 648, 173 P.2d 825 (1916). The cruelty of exile is obviously many times greater if it must be suffered in prison.

Life in prison is barren and painful, and often all that gives meaning to a prisoner's existence is the time and the love he shares with his family. To rob him of that is a "punishment more primitive than torture," Trop v. Dulles, supra, 356 U.S., at 102.

It may be neither cruel nor unusual to force a man who has wronged to give up his freedom. To force him to give up his family is both cruel and unusual. It is nothing less than the "gratuitous infliction of suffering," Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion of Stewart, Powell and Stevens, J.J.) and "offensive to cardinal principles for which the Constitution stands." Trop v. Dulles, supra,at 102.

Amici urge this court to hold modern day "transportation" -- the shipout policy -- unconstitutional under the Eighth Amendment.

B. INVOLUNTARY INTERSTATE TRANSFER OF A STATE PRISONER TO A FEDERAL PRISON, WITHOUT AFFORDING HIM PROCEDURAL SAFEGUARDS AND A DEMONSTRATION OF A COMPELLING STATE INTEREST, VIOLATES THE FOURTEENTH AMENDMENT.

1. Family Integrity

a. A prisoner has a fundamental liberty interest in maintaining reasonable contact with his family.

Transfer of a state prisoner to federal prison separates him from his family by hundreds if not thousands of miles. The practical effect of such a transfer, unlike a transfer to another prison within the state, is to eliminate any opportunity for the family to spend time together. This disruption of the family unit substantially impairs well-established rights of the transferee as well as those of other members of his family.

The relationship between a parent and his child is constitutionally protected. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S.

510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). As this Court noted in Stanley v. Illinois, 405 U.S. 645 (1972), a father's interest in the companionship of a child is "cognizable and substantial." 405 U.S., at 652. "The private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection." Id., at 651.

While the parent's right to participate in, and direct the upbringing of, a child, recognized in Meyer, Pierce and Yoder is not absolute, limitations on it have been approved by this Court only if imposed to promote the welfare of the child, or to accommodate the child's conflicting interest. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (conviction of child's guardian under child labor law, upheld), Parham v. J.R., 442 U.S. 584 (1979) (parents' power to commit child to mental hospital, not unlimited); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (blanket parental consent requirement for child's

abortion, unconstitutional). In the present context there is no conflict between the inmate's and the child's interest, and indeed it is commonly accepted that destruction of the parent-child bond is extremely harmful to the child.

The relationship between husband and wife, "an association for as noble a purpose as any involved in . . . prior decisions [of this Court]" is also constitutionally protected. Griswold v. Connecticut, 381 U.S. 479, 486 (1965). See also Loving v. Virginia, 388 U.S. 1 (1967).

The most essential and basic element of this well-established right to family integrity is the "right of the family to remain together." Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (due process required before mother can be deprived of children by the state). See also Moore v. East Cleveland, 431 U.S. 494 (1977) (reversing conviction under housing ordinance, effect of which was to prohibit extended family from sharing home); Stanley v. Illinois, supra. Clearly, transfer of the state inmate to a distant federal prison, which effec-

tively forecloses the possibility of family visits, substantially impairs the fundamental rights of the prisoner and others in his family.

The fundamental right to family integrity, which is so severely affected by transfer to a remote federal prison, has already been recognized in the prison context by lower federal courts. For example, in Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977), the court concluded that complete curtailment of visitation would violate the inmates' First Amendment rights to familial association and communication, as well as the Eighth Amendment right to be free of cruel and unusual punishment. 437 F. Supp., at 322. Moreover, restrictions on an individual's visitation were viewed as a deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment which would require procedural protections. Id. See also Ramos v. Lamm, 485 F.Supp. 122, 150, 162 (D. Col. 1979) (restriction on visitation which is protected by First, Ninth and Fourteenth amendments, will be valid only if it furthers important

government interest and is not unnecessarily broad); Mabra v. Schmidt, 356 F.Supp. 620, 631 (W.D.Wis. 1973); Agron v. Montayne, 392 F.Supp. 454, 456 (W.D. N.Y. 1975); Avi v. Gibson, 483 F.Supp. 1102, 1123 (D.V.I. 1979); Rhem v. Malcolm, 371 F.Supp. 594, 625 (S.D.N.Y. 1974).

Accordingly, the law seems clear that a person, including a prisoner, has a fundamental interest in maintaining reasonable contact with his family, and that for a prisoner this interest is sustained through visitation. Indeed, no less a voice than the Chief Justice's recently called for "generous family visitation in decent surroundings to maintain family ties."[1/] It is equally clear from the facts that the possibility of such visitation is irreparably fractured by involuntary interstate transfer into the federal system.

[1/] Annual address of Hon. Warren E. Burger to American Bar Association, February 1981.

b. A prisoner may not be deprived of his fundamental interest in family contact without being afforded procedural due process.

The amici contend that the State should not be permitted, constitutionally, to deprive a prisoner of his family contacts by transferring him out of state without first giving him clear notice of its intent and the reasons therefor and an opportunity to be heard, wherein he may confront and question those reasons and have a fair chance of persuading the hearing authority not to allow the shipout. Such procedural safeguards have been required by this Court in other situations where the fundamental interest of family integrity is involved.

This Court has made clear, for instance, that the Constitution requires that appropriate procedural protections be provided before a parent who has abused or neglected a child may be deprived of the child's custody. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (dictum). See also Stanley v. Illinois,

405 U.S. 645, 658 (1972). If such a parent, who has in some sense committed a crime against his child, merits procedural protection before being deprived of the child, certainly an inmate who has not so acted should be entitled to as much.

In Procunier v. Martinez, 416 U.S. 396 (1974), a case involving prison censorship of personal letters written by both prisoners and their families and friends outside the walls, this Court required that the First Amendment interest be accorded "minimum procedural safeguards" against error and arbitrariness. 416 U.S., 417-419.

Most significantly, in Vitek v. Jones, 445 U.S. 480 (1980), decided last term, involving the State's claimed right to transfer a prisoner to a mental hospital, the Court held that even a convicted prisoner retained a "residuum of liberty" not to be stigmatized or subjected to qualitatively different deprivations of liberty in a mental hospital and was thus entitled to a pre-transfer due process hearing. 445 U.S., at 491, 494.

Amici emphasize that the prisoner's fundamental interest in family integrity, on which they base their argument that the prisoner has a right to a pre-transfer hearing, is an independent constitutional right. Its existence does not depend on whether or not there is a relevant federal or state statute creating an entitlement or a legitimate expectation to stay in one state prison rather than another. Thus this case is distinguishable from Meachum v. Fano, 427 U.S. 215 (1976) and Montayne v. Hames, 427 U.S. 236 (1976), where the absence of such a separate statute was held fatal to prisoners protesting their intrastate transfers.

Similarly, though the harm to prisoners subjected to interstate transfer is plainly a "grievous loss," it is not that characterization -- held unavailing to the prisoners in Meachum and Montayne -- which gives rise to the right. The right to family integrity arises from the Constitution itself. Vitek v. Jones speaks of the prisoner's "residuum of liberty", and amici contend that the prisoner's family inte-

grity is part of that residuum, requiring procedural protections before it may be compromised.

Several factors considered to be of significance by this Court in Vitek, are also relevant in the present context and support a similar result here. Specifically, the opinion in Vitek notes that transfer to a mental hospital will result in a "massive curtailment of liberty"; that it may "engender adverse social consequences . . . [with a] . . . very significant impact on the individual"; and that the interests affected are "among the historic liberties protected by the Due Process Clause." 445 U.S., at 491, 492.

Certainly transfer to a federal prison results in as complete a curtailment of certain historically protected liberties as does transfer to a mental hospital, and the personal and social consequences to the individual, although different, can be just as disastrous. One can easily imagine how an inmate might choose to remain near his loved ones and within reach of state courts albeit in a mental hospital, than be shipped across the country to a

remote federal prison.

Whatever hostility and resentment is engendered by involuntary transfer, it is many times multiplied by denying the affected individual an opportunity to be heard. Improving the decision-making process by providing a pre-transfer hearing will not deprive prison officials of needed discretion in evaluating the facts as found. Since an erroneous decision needlessly imposes great hardship on the inmate, fairness requires that he have an opportunity to correct inaccurate information and to provide additional relevant data, whatever the asserted justification for the transfer. Moreover, the potential infringement to First Amendment rights, as demonstrated by the recent Massachusetts experience (supra, pp.8-10), suggests that only such a hearing can hope to insure that the asserted justification is the real justification. What Justice Frankfurter stated some thirty years ago in another context is no less true today in the face of an administrative decision to ship a prisoner out of state:

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking, and self righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1950) (concurring).

A pre-transfer hearing is needed not only to enhance the reliability of the fact determination process, but should also prove helpful in considering the dispositional alternatives available. Should highly unusual circumstances be deemed to justify transfer outside of the state, it is necessary to give careful consideration to each alternative, including other in-state facilities or those of neighboring states. A thorough canvassing of these alternatives will help prison officials accomplish legitimate objectives without upsetting the inmate's life and those of his loved ones any more than is necessary.

Finally, according the prisoner due process also furthers the correctional interest in rehabilitation. As the Chief Justice noted with respect to parolees in Morrissey v. Brewer, 408 U.S. 471 (1972):

> "Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocation will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S., at 482.

These words ring no less true when applied to a prisoner facing exile to the federal system.

c. At a pre-transfer due process hearing there must be a demonstration of a compelling state interest.

Much as the due process hearing should be the forum where the prisoner can seek to question and rebut the State's case for transfer, so it should also be the forum for the State to assert its justification. And the amici urge

that the standard which the State should meet should not be mere reasonableness, but that there be a substantial, indeed compelling, State interest in shipping the prisoner into the federal system. If he is to be deprived of his fundamental right to family integrity, the State's need should be no less.

In Procunier v. Martinez, 416 U.S. 396 (1974), this Court considered the proper standard to be applied to mail censorship regulations in a prison context. Noting that protected rights of "free citizens" were abridged by the censorship practice, the Court refused to base the standard of review on any "assumptions about the legal status of prisoners." 416 U.S., at 409. In order to derive the proper standard of review the opinion referred to earlier decisions, outside of the prison context, dealing with the problem of incidental restrictions on First Amendment liberties. Id.

The regulations under consideration in Procunier v. Martinez were held invalid under the standard gleaned from these earlier, non-prison, First Amend-

ment cases. To survive review under this standard a censorship regulation will have to further "an important or substantial government interest" and may not restrict protected rights any more than "necessary or essential." Id., at 413.

Amici urge that the Court take the same approach in this case with respect to the rights of the prisoner's wife and children to family integrity. Under the standard applied in the family integrity cases, it is clear that transfer should not be carried out unless required by a compelling state interest. Roe v. Wade, 413 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Moreover, in order to ensure that impairment of protected rights be no broader than necessary (Roe, supra, at 155; Griswold, supra, at 485), amici urge that transfer,even where called for, should be to the closest suitable facility.

2. Access to Courts

a. A prisoner has a fundamental liberty interest in access to the courts.

As explained in some detail in the Facts section of this brief, supra, pages 16-17, a state prisoner shipped to a distant federal prison is effectively deprived of any meaningful access to the courts with authority over his sentence. Contact with his attorney is substantially diminished if not terminated and is not replaced by contact with another equally versed in the state law under which he was sentenced. Nor does he have access to materials needed to research the state law on his own while in the federal prison.

Yet, it is well-established that a prisoner has a fundamental constitutional right to "adequate, effective and meaningful" access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977). It is, perhaps, his most precious right, for without it "all other rights . . . are illusory." Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973).

As this Court noted in Johnson v. Avery, 393 U.S. 483 (1969), prisoners' access to the courts for the purpose of presenting their complaints "may not be denied or obstructed." 393 U.S. at 485. In Johnson, a regulation barring inmates from furnishing legal assistance to other prisoners was held unenforceable, where there was no adequate alternative assistance available. As this Court said in Procunier v. Martinez, 416 U.S. 396 (1974), in that part of the case involving the ban on law student or paralegal interviews with prisoners, inmates must have a "reasonable opportunity to seek and receive the assistance of attorneys, ... and practices that unjustifiably obstruct the availability of professional representation . . . are invalid." 416 U.S., at 419.

Similar impediments to access have been removed by other decisions of this and lower federal courts. See, e.g., Ex Parte Hull, 312 U.S. 546 (1941) (regulation requiring that habeas corpus petitions be reviewed by prison officials held invalid); Adams v. Carlson, supra, (prison officials enjoined from

requiring attorney-client interviews to occur by phone in partitioned room).

b. A prisoner may not be deprived of such access without a due process hearing and a demonstration of a compelling state interest.

The cases on prisoner access to the courts speak in absolute terms, suggesting that the effective cutting-off of that access, which interstate shipouts produce, is prohibited altogether. Indeed, amici assert that such ought to be the law,and that involuntary interstate transfers should be likewise prohibited.

But if this Court is not inclined to extend the absolutism of Bounds and similar cases to the context of interstate transfers, amici urge that, before any such transfer take place, the prisoner's right of effective access to the courts should entitle him, at the very least, to a due process hearing at which there is a convincing showing by the State that the need to transfer the prisoner supervenes the right.

There are no cases on this point

which counsel could find. But the analysis used in Vitek v. Jones, discussed supra, pp.32-34 involving a transfer to a mental hospital, seems apt. If the prisoner is to have part of his "residuum of liberty" trenched upon, he should at least have the protection of procedural safeguards against error or arbitrariness. And the State should have to show, in that particular case, why there is no reasonable alternative to the proposed transfer into the federal system.

IV. Conclusion

For the reasons stated, amici urge that this Court reverse the decision below and hold unconstitutional the involuntary interstate transfer of state prisoners into the federal system; or, in the alternative, vacate the decision and remand this case to the Second Circuit for consideration in light of the constitutional issues necessarily implicated in interstate transfer of prisoners.

Respectfully submitted,

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Counsel gratefully acknowledges the assistance of Harvard Law Student Paul Zieff in the preparation of this brief.

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS SENATE
STATE HOUSE, BOSTON

SENATOR JACK H. BACKMAN
SECOND MIDDLESEX-NORFOLK DISTRICT
TEL. 727-7295

CHAIRMAN
COMMITTEE ON HUMAN SERVICES
AND ELDERLY AFFAIRS

CHAIRMAN
COMMITTEE TO INVESTIGATE SECLUSION,
RESTRAINT AND DEATHS IN
STATE SUPPORTED FACILITIES

TO: Senator Jack H. Backman, Senate Chair,
Joint Committee on Human Services &
Elderly Affairs

FROM: S. Brian Willson, Staff Assistant

RE: Factual Findings & Analysis
Relating To Survey of Massachusetts
State Prisoners Shipped To Other
State and Federal Prisons During
Calendar Year 1980

DATE: February 9, 1981

PART 1. FACTUAL FINDINGS--OUT OF STATE PRISONER TRANSFER QUESTIONNAIRE

In November of 1980, a questionnaire was sent to 19 Massachusetts prisoners who had been transferred out of state during 1980. The information below summarizes what these questionnaires revealed about the procedures and circumstances surrounding these transfers.

1. None of the 19 men asked or wanted to be transferred.

2. At the time of the transfers, all of the men were incarcerated in Walpole, but in various locations within that institution.

3 men were in Block 10 (Departmental Segregation Unit)
1 man was in Block 9 (Protective Custody)
4 men were in Maximum Security Blocks
11 men were in Minimum Security Blocks

3. Though 12 of the 19 men had received disciplinary tickets (for alleged violation of various prison rules, virtually all minor and nonviolent in nature) in the 6 months prior to their being shipped out, 7 men had not received any disciplinary reports in that 6-month period. The breakdown of the nature of the disciplinary tickets for the 12 men:

3 for contraband (1 marijuana cigarette, a 1" piece of steel, and benedril)
4 for participation in peaceful demonstrations against prison practices
1 for yelling for law library access
1 for refusing to cooperate with a rectal search
1 for several charges which were dismissed
2 for unknown reasons

4. At the time the transfers were initiated, none of the 19 men were given any official or unofficial notice of any kind as to why or to where they were being moved. Seventeen of the men indicated that they explicitly requested information about what was happening to them.

The general response to these inquiries was: "We don't know, we are just obeying orders."

5. None of the 19 men had participated in any hearings or discussions before or with any board, panel or official relating to the reasons for the shipments prior or subsequent to the transfers. That remains the case today.

6. Fourteen men requested permission to inform members of families or friends about the transfers before they left Massachusetts. None of the men were allowed to do this.

7. The method utilized in shipping the men generally could be described as follows: The men, ordered by guards in early morning or late evening hours to be handcuffed, chained, and shackled in their cells, were escorted to station wagons for the journey, usually one man per car accompanied by 2 guards. Guards did not provide reasons or identify destinations, either voluntarily or in response to the men's inquiries. The cars stopped for gas at some point where the men were escorted cuffed, chained and shackled to the men's room and subsequently provided 2 bologna sandwiches and kool aid. Destination reached several hours later, the men were immediately confined to segregation at the new prison.

8. Once at their new locations outside Massachusetts, they were allowed to call collect to a contact person, but not without considerable delay in many cases:

7 men were able to contact a family member or friend within 24 hours of their transfer
8 men had contact only after several days
4 men had contact only after more than a week had elapsed

9. The transfers have created serious problems for these men; among those cited are:

interference with parole plans and development of community ties;
inability to adequately address grievances with Mass. officials;
no more visits;
detrimental effect on family's health;
breakup of marital relationships--one man has 7 children;
school work stopped;
no programs available at new prisons;
interruption of mail service;
the threat of violence in the new prison;
no opportunity to accumulate good time;
disruption of their access to courts, legal materials and lawyers

10. The individuals shipped out of Massachusetts were or had been involved in numerous programs and activities while at Walpole:

religious groups (Christian Action Group, Catholic Discussion Group, etc.)
educational programs (both college and GED)
therapy and rehabilitation (AA, Association for the Reduction of Violence, Self-Awareness, etc.)

special interest groups (Irish-American Heritage Group, Black Caucus, Vietnam Vets, etc.)
social action groups (Race Relations, Big Brothers, Reach Out Youth Counseling, etc.)
political groups (National Prisoners' Rights Association, Norfolk Inmate Council, etc.)

11. Thirteen of the 19 men transferred have civil suits pending against the Dept. of Correction. Another man was in the process of preparing a complaint. All 19 now indicate that they no longer have any access to Mass. legal materials or adequate access to their own or other lawyers.

12. Transfers occurred during 1980 in three separate shipouts--Feb. 16, Aug. 12 and Sept. 12 to:

Federal Bureau of Prisons:

Lewisburg, PA.	6	(400 miles from Boston)
Leavenworth, Kan	3	(1600 miles from Boston)
Marion, Ill.	3	(1400 miles from Boston)
Terre Haute, Ind	3	(1200 miles from Boston)
Lompoc, Calif.	1	(over 3000 miles from Boston)

New Hampshire State Prison 1
Rhode Island State Prison 2
TOTAL
19 prisoners

13. It is worthwhile to note the responses of some of the men when they were asked why they felt they were transferred out-of-state.

"A purely vindictive action for my speaking out against the brutality inflicted upon prisoners in Cell Block 10 at Walpole."

"Personally, I feel the 'move' was political I had access to all ethnic groups in the prison and I was respected by many. I was a leader who the 'authorities' couldn't/can't buy."

". . . because I knew too much and had influence on my peers."

" . . . because of the suit I have pending against the D.O.C. and because of my being a part of exposing the injustices in Walpole."

"Because of my legal work, group involvement, and ability to motivate and create group participation. I make programs work--Walpole administration refuses/fails to create, maintain any viable programs. - - - All of the peacemakers and prisoners who use leadership in a positive manner are being removed from Walpole."

PART II. ANALYSIS--RELATING TO RESULTS OF OUT OF STATE PRISONER TRANSFER QUESTIONNAIRE

Department of Correction Acting Commissioner Louis Berman in a letter to Senator Jack Backman explained that transfers were for prisoners (1) for whom Massachusetts did not have safe or adequate maximum security facilities, (2) who presented "Management" problems, or (3) who simply might do better elsewhere.

Massachusetts has very severe maximum security facilities--as secure if not more so than most facilities of other states and the Federal Bureau of Prisons. There are no apparent special treatment programs being administered to any of the transferred prisoners at their new facilities.

With 11 of the men having been housed in the minimum security blocks at Walpole just prior to transfer, it does not seem that those men had posed security or management problems there. Furthermore, in the 6 months prior to their transfers, 7 had received no disciplinary tickets, and for the other 12 men who had received tickets, the results indicated they were virtually all for petty, minor and nonviolent infractions or were dismissed altogether. There were and are now no known pending criminal charges against any of the men for crimes committed in the prison (or outside the prison).

Thus, if the men were considered special management problems, it is not evident from their particular location in prison housing units or their prison disciplinary records.

Perhaps the Department considers these prisoners "management" problems due to their activities as litigants and respected leaders

among the captive population. Thirteen of the men had their own suits pending against the Department of Correction. Many of these men also helped prepare legal materials for scores of other prisoners. Not only did the transfers remove them from Massachusetts legal materials but it also removed them from access to hundreds of other prisoners in need of these services as "in-house" legal counselors.

Furthermore, most of those shipped (at least 14) had been involved in various activities as leaders among the prisoners in programs, associations, work assignments and in public and political efforts to improve conditions at Walpole.

Thus, it is evident that the men shipped were and are articulate leaders within the prisoner population and that their removal seems to be a management tool for assuring absolute control rather than one of eliminating "management" problems. More significant is the fact that these prisoners were exercising their rights to petition the courts for peaceful resolution of grievances and their Constitutional rights to speak out in a nonviolent manner against injustices, many of them violent, being perpetrated upon them by prison officials. Nonviolent behavior of prisoners in Massachusetts is severely punished, even to the extent of exile. An old prison maxim says: "No good deed goes unpunished."

Such shipments, in addition to effectively shutting off the capability of rights of petition, has a brutal effect on the social and family relationships, and subsequently on both the psychological and physical health of family members and prisoners alike.

It might be instructive to make reference to the Report of the Attorney General (of the state of New Mexico) on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico, Part II, issued September, 1980, especially as to the effect of prison officials attempting to maintain absolute control through destruction of prisoner leadership and participation roles.

"The early 1970s was a time of relative order at the Penitentiary of New Mexico - - - partly the result of a series of formal and informal incentives which were used by the administrators to motivate inmates to accept and cooperate in the orderly operation of the institution - - - During the late 70s, many of the formal and informal incentives were removed by a new administration. The result was a forced reliance on coercion as the primary method of inmate control.

"We only stay in control of prisons to the degree that the prison population as a whole sees our administration as fair, humane, somewhat reasonable, something they can understand . . . The primary factor leading to the February, 1980 riot was the disruption of incentive controls over inmates. The removal of incentives undermined inmates' self-interest in keeping order and disrupted the non-violent power sources of convict leaders - - - The curtailment of most programs--formal incentives--eliminated a major source of nonviolent convict power - - - - As the inmate society grew more violent, it fragmented into small self-protective cliques with no strong central leadership - - - - The arbitrary and excessive use of segregation soon exhausted its value as a disciplinary tool because inmates felt they had little to lose and much to gain by disobeying rules. The need for an alternative coercive control fostered the practice of manipulating informants as a means of control.

"The abrupt change in inmate society coincided with administrative and staff upheaval at the Penitentiary."

Governor Jerry Apodaca brought in 2 veterans of the federal prison system to run the Penitentiary in 1975. They "attempted to tighten security at the prison by restricting programs."

(pp 5-6, Part II of Report)

"A staff member described the change that he observed: '(Before 1975) I could just about identify the different cliques and different powers. There was an inmate code where inmates respected boundaries . . . The federal wardens had no respect for the inmate powers that be. They had no respect for their ways - - - - so they started breaking things up left and right which created an imbalance.'"

(pp 29-30, Part II of Report)

APPENDIX B

Extracts from Habeas Corpus Act of 1679, 31 Car. II, c. 2

IX. Provided always, and be it enacted by the authority aforesaid, That if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers, whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; (2) unless it be by habeas corpus or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol; (3) or where any person is sent by order of any judge of assize or justice of the peace, to any common work-house of house of correction; (4) or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; (5) or in case of

sudden fire or infection, or other necessity; (6) and if any person or persons shall after such commitment aforesaid make out and sign, or counter-sign any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs, or counter-signs such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offense respectively, to be recovered in manner aforesaid by the party grieved.

XII. And for preventing illegal imprisonment in prisons beyond the seas; (2) be it further enacted by the authority aforesaid, that no subject of this realm that now is, or hereafter shall be an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his Majesty, his heirs or successors; (3)

that every such imprisonment is hereby enacted and adjudged to be illegal; (4) and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment. . . .

CERTIFICATE OF SERVICE

I, Ernest Winsor, Esq., counsel of record for the above named amici curiae, certify that on March 11, 1981 I served the above brief on all parties in the case by mailing postage prepaid, first class, copies thereof to each of their counsel of record, as follows:

Petitioner, Robert Howe, Sr.	William A. Nelson, Esq. Office of Defender General Montpelier, VT 05602
Respondent, William French Smith, Attorney General of the United States	Hon. Wade H. McCree, Jr. Solicitor General, U.S. Dept. of Justice 5143 Main Jus- Building 10th and Constitution Aves. Washington D.C. 20530
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MOTION FILED
MAR 12 1981

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5392

ROBERT HOWE, SR.,
Petitioner,

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER and BRIEF OF THE KANSAS DEFENDER PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5392

ROBERT HOWE, SR.,
Petitioner,

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WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The Kansas Defender Project, by and through counsel, respectfully moves this Court for permission to file a brief amicus curiae in support of the petitioner. Consents to the filing of this brief have been received from the Solicitor General on behalf of the federal respondents and from petitioner. However, the Respondent Cuiros, who intervened in the court below, has refused to grant consent.

The Kansas Defender Project is a clinical law school program in which students assist inmates at the United States Penitentiary in Leavenworth and other institutions. The program was one of the first of its kind in the country, and is at present one of the most extensive legal assistance programs in the nation.

Over the past several years, the Project has assisted a considerable number of state prisoners housed in the Leavenworth penitentiary pursuant to contracts between the state and federal government under 18 U.S.C.

§ 5003. In so doing we have litigated the legality of transfers such as the one in the instant case,* and have assisted state inmates with problems of parole and good time.

The issue here is whether the language of § 5003 limits the Bureau of Prisons' ability to accept state prisoners by requiring that it only accept inmates who are in need of and who will receive rehabilitative treatment. The question is one of Congressional intent, and will necessarily also require analysis of the Government's administrative construction of the statute. Because we have represented a large number of contract prisoners, we have gained a broad knowledge of the actual operation of the Bureau's contract programs. We wish to provide the court with information on the extent of the transfer program, its operation over time, and the effects of out-of-state transfers on

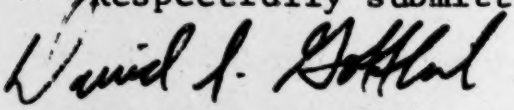
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*See Brief of Kansas Defender Project as Amicus Curiae at 2.

state prisoners. Only after considering such information can this Court properly conclude whether the Bureau's construction of the statute effectuates Congressional intent and is entitled to deference. Counsel for Petitioner represents Vermont state prisoners, rather than prisoners in federal institutions; we understand that his brief will not include the kind of information that our longstanding representation of federal prisoners enables us to provide.

A large number of states now contract with the federal government, and the decision of this Court will have a substantial impact on state corrections and state prisoners. That very reason undoubtedly prompted Respondent Cuiros to intervene, and it is expected that other states will file amicus briefs. We request the granting of our motion to enable this court to receive a more complete and balanced picture of the issue.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5392

ROBERT HOWE, SR.,
Petitioner,

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE KANSAS DEFENDER PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE KANSAS DEFENDER PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Kansas Defender Project, by and through counsel, files this brief as amicus curiae in support of the petitioner.

STATEMENT OF INTEREST

The Kansas Defender Project (KDP) is a clinical law program at the University of Kansas School of Law in which students provide legal assistance for inmates at the United States Penitentiary in Leavenworth and Kansas state institutions. The Project, which

began in 1965, is one of the first legal assistance clinics of its kind, and was referred to with approval by Justice Douglas, concurring, in Johnson v. Avery, 393 U.S. 483, 495 (1969). In the past five years alone, the Project has counseled over one thousand Leavenworth inmates, making it one of the most extensive programs of legal assistance for prisoners in the country.

Recently, a number of our cases have involved prisoners incarcerated in Leavenworth pursuant to contracts between the states and the federal government authorized by 18 U.S.C. § 5003.[1] Our efforts have been directed at assisting contract prisoners in dealing with state parole authorities or securing state good-time, as well as in litigating the question of the legality of § 5003 transfers.[2]

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[1] In the past year, we have assisted inmates from Delaware, Washington, New Mexico, Wyoming and Arizona.

[2] Recent caees involving 18 U.S.C. § 5003 in which the KDP has provided assistance for Leavenworth inmates include: Fletcher v. Warden, ___ F.2d ___, Nos. 79-1156, 80-1749 (10th Cir., Feb. 13, 1981); In Re Curtis L. Johnson Personal Restraint Petition, No. 3905-III-6 (Wash. Ct. App. Div. Three, filed Apr. 1,

As a result, we have gained experience with the consequences of transfers under 18 U.S.C. § 5003.

The primary purpose of this amicus curiae brief is to present additional information, based in part on the experience of amicus in representing state prisoners in federal institutions, that will provide the Court a more complete picture of the issues.

A motion to file this brief has been submitted to this Court.

SUMMARY OF ARGUMENT

This case presents the question of whether 18 U.S.C. § 5003 grants the Bureau of Prisons the discretion to accept state prisoners into any of its facilities for any purpose, or whether, on the other hand, the statute limits the Government's discretion by a requirement that state prisoners be transferred only to federal treatment facilities for rehabilitative or medical

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1980); Watson v. Delaware, No. 196, 1979 (Del. Sup. Ct., Oct. 7, 1980).

treatment.

We submit that the latter view is the only sensible construction of the statute. The statutory language contains a requirement that the Bureau of Prisons certify the availability of "treatment facilities" and the House Judiciary Committee Report contains an explicit statement that the use of federal facilities is restricted to those inmates in need of treatment. Congress' use of the term "treatment facilities" in related statutes, particularly the Youth Corrections Act, demonstrates that the term "treatment facility" is not a euphemism for penitentiary and was not included in § 5003 as an oversight. The Justice Department's present belief that it has unlimited discretion is inconsistent with its earlier pronouncements, contrary to Congressional intent, and entitled to no weight.

Adoption of the construction of § 5003 urged by the Government would frustrate the purpose of the statute. While Congress was interested in fostering the treatment

and rehabilitation of state inmates, the Bureau's construction would make rehabilitation more difficult. The transfer of a state inmate to a federal prison, often thousands of miles from his home, may hinder rehabilitation by weakening the communication between the inmate and his family and friends, impairing access to the courts, disrupting education or vocational training and hampering the inmate's parole opportunities.

ARGUMENT

POINT I

ONLY THOSE STATE INMATES IN NEED OF SPECIALIZED TREATMENT AVAILABLE IN THE FEDERAL SYSTEM MAY BE TRANSFERRED TO FEDERAL CUSTODY PURSUANT TO 18 U.S.C. § 5003.

18 U.S.C. § 5003 permits the Attorney General, "when the Director shall certify that proper and adequate treatment facilities and personnel are available," to contract with states for the "custody, care, subsistence, education, treatment and training" of state prisoners. In Lono v. Fenton, 581 F.2d 645

(7th Cir. 1978) (en banc), the Seventh Circuit held that the statute, because of its reference to treatment facilities, authorizes transfers from the state to federal prisons only for some actual treatment need. In the decision below the Second Circuit rejected Lono's rationale, finding that the term "treatment facility" simply named federal prisons in terms of their "most laudable (if, perhaps, least often realized) goal"; that the states were authorized to contract for purposes other than "treatment"; and that the Government's administrative construction must be given deference. Howe v. Civiletti, supra, 625 F.2d at 457-458.[3] We submit that analysis of the history of § 5003 and surrounding legislation demonstrates that the court in Howe was incorrect. "Treatment facilities" are more

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[3]The majority of courts have agreed with Howe in rejecting Lono's interpretation of § 5003. Fletcher v. Warden, ___ F.2d ___, Nos. 79-1156, 79-2062, 80-1749, (10th Cir., Feb. 13, 1981); Beshaw v. Fenton, ___ F.2d ___, No. 79-1777 (3d Cir., Dec. 15, 1980); Sisbarro v. Warden, 592 F.2d 1 (1st Cir.), cert. denied, 444 U.S. 849 (1979).

than euphemisms for prisons, and the court's reliance on the Bureau's construction of the statute is inappropriate.

We begin with the words of the statute itself. 18 U.S.C. § 5003(a) provides:

> The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

The statute does not authorize transfers at any time prison space is available--a certification is required that "treatment facilities and personnel" are available. Since the Director must certify that "treatment facilities" are available, it follows, if the act is to have any sense, that the only place a contract prisoner can be

transferred is to a "treatment facility" and that one of the purposes of the transfer must be to provide treatment.

This interpretation is supported by the explicit language of the legislative history of the Act. The bill was first introduced in the Senate, at the request of the Department of Justice. In a letter to the Judiciary Committee, Deputy Attorney General Peyton Ford stated that the legislation was being proposed because:

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but not available to the States. These requests usually relate to juveniles, concerning whom many of the States are without satisfactory institutions and training programs.

S. Rep. No. 978, 82nd Cong., 1st Sess. 2 (1951).

The bill passed the Senate[4] and was then

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[4]The bill passed without debate. However, in

referred to the House Judiciary Committee, which recommended passage of the bill in a report that emphasized that the bill's purpose was to make rehabilitative or medical treatment facilities in federal prisons available to state prisoners.

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts, concerning whom many of the States are without satisfactory institutions and training programs. The Bureau of Prisons points out that it now has Federal facilities available, including medical and administrative personnel, to accommodate those State offenders that are in need of the various types of treatment that Federal institutions are providing . . . .

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his very brief remarks on the Bill in the Senate, the Sponsor, Senator McCarran, noted that federal custody could be authorized only "under certain conditions" and "in a limited category of cases." 97 Cong. Rec. 13543 (1951).

H.R. Rep. No. 1663, 82nd Cong., 2d Sess. 1 (1952); 2 U.S. Code Cong. & Admin. News, p. 1421 (1952).

In its summary of the contents of the bill the House Report cited the limited purposes for which transfers could be accomplished, and provided, as well, a definition of treatment:

> The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act (sec. 5006 g, title 18, U.S.C.).

H.R. Rep. No. 1663, supra, at 2; 2 U.S. Code Cong. & Admin. News, supra, at 1421.

A comparison between the language of § 5003 and related statutory provisions demonstrates beyond doubt the concrete meaning of the terms "treatment" and "treatment facility." 18 U.S.C. § 5003 appears next

to and was passed less than two years after the Youth Corrections Act (YCA), 18 U.S.C. §§ 5005-5026. Modeled after the English Borstal system, the YCA was designed as "a new alternative sentencing and treatment procedure" for persons under 22. S. Rep. No. 1180, 81st Cong., 1st Sess. 1 (1949). Under § 5010, eligible Youth Offenders may be sentenced for "treatment and supervision" in lieu of ordinary imprisonment. The YCA was created with the aim of rehabilitation rather than retribution. "The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive ideas of dealing with criminals and looks primarily to the objective idea of rehabilitation." H.R. Rep. No. 2979, 81st Cong., 2nd Sess. 3; 2 U.S. Code Cong. & Admin. News, p. 3982, 3985 (1950). See Dorszynski v. United States, 418 U.S. 424, 434 (1974).

Like commitments under 5003, commitments

under the YCA are to "treatment facilities." 18 U.S.C. § 5012 provides:

> No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided. (Emphasis supplied).

Similarly, the Narcotic Addict Rehabilitation Act, passed after the YCA and § 5003, under which eligible addicts are sentenced to "treatment" (18 U.S.C. § 4253(a)), also contains the requirement that no inmate be committed "if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable . . .".

Thus, contrary to the Second Circuit's position, the term "treatment facility" is not a euphemism. In fact, it has been used in precisely those situations where Congress contemplated a commitment for rehabilitative treatment, as opposed to an ordinary penal commitment.

In contrast, where treatment is not

Congress' principal concern, it has had no difficulty characterizing Bureau of Prisons facilities in terms other than treatment facilities. 18 U.S.C. § 4001 vests control and management of federal "penal and correctional institutions" in the Attorney General. 18 U.S.C. § 4042 provides that the Bureau shall manage all federal "penal and correctional institutions"; § 4081 speaks of the integration of all federal "penal and correctional institutions." See also 18 U.S.C. §§ 4122(b), 4123, (federal prison industries) and 4161 (computation of good time). Further, 18 U.S.C. § 4002 authorizes the Bureau of Prisons to contract with state facilities for the purpose of providing "suitable quarters", not treatment faciltiies, for federal prisoners. See also 18 U.S.C. § 4100-4115 (transfers of inmates to and from foreign countries--treatment used only in reference to juveniles and mentally ill).

The task of this Court in construing § 5003 is to ascertain Congressional intent

and give effect to the legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). In so doing, the Court is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Here, the language of the statute, its legislative history and related statutory provisions demonstrate that the term "treatment facility" has a concrete meaning. The conclusion of the Court below that "treatment facility" is but a euphemism for prison is without basis.

The Second Circuit's alternative basis for the conclusion that § 5003 contains no requirement of treatment fares no better. The court relied on the fact that § 5003 authorizes the Bureau to contract for the "custody, subsistence, education, treatment and training" of state offenders as evidence that the statute gives neither primacy to treatment nor provides a basis for concluding that treatment must be furnished.

Again, reference to the Youth Corrections Act demonstrates the weakness of the court's decision; under the YCA the Government may contract with any public or private agency, "for the custody, care, subsistence, education, treatment and training of committed youth offenders . . . ." 18 U.S.C. § 5013. The use of terms other than treatment in § 5013 of the YCA in no way detracts from the requirement that a YCA commitment be to a "treatment facility" and for treatment; rather, it simply reflects the fact that the Bureau in § 1513, like the states in § 5003, must pay for all the aspects of a treatment program, including custody care and subsistence, as well as treatment.

Finally, the court below placed considerable weight on the Bureau of Prisons' present construction of § 5003. While we recognize that, under ordinary circumstances, the construction of a statute by an agency charged with its implementation is entitled to weight, Adamo Wrecking Co. v. United

States, 434 U.S. 275, 287 n. 5, 288 (1978), there are a number of reasons why that doctrine is inapplicable here.

First, it is well settled that the weight accorded an administrative construction depends in part on the contemporaneity of the construction with the enactment of the statute. General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976). Accord, Zuber v. Allen, 396 U.S. 168, 192 (1969). Moreover, a construction will carry the most weight "when the administrators participated in drafting and directly made known their views to Congress in Committee hearings." Id. at 192. Here, Mr. Ford's letter to the Senate Judiciary Committee is the only written record of the Justice Department's contemporaneous views on the meaning of § 5003. As noted, supra at 8, that letter, if it supports any construction of the statute, supports the view that the statute was to be utilized in those cases in which treatment was required.

Second, the weight accorded an

administrative construction depends in large measure on the consistency of the agency interpretation with earlier and later pronouncements, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), and the express articulation of the construction by the administrative agency. Investment Co. Institute v. Camp, 401 U.S. 617, 627 (1971). As the majority in Lono pointed out, it was sometime after the statute's adoption that "the Bureau of Prisons began to give it a much broader interpretation." 581 F.2d at 647. Moreover, the Bureau failed in Lono, and has failed since that case, to disclose a single written statement setting forth its broader interpretation of § 5003.[5]

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[5]The only mention of § 5003 in the Department's regulations is made in reference to the duties of the Director of the Bureau of Prisons. The regulation, parroting the statutory language, authorizes the Director to enter:

> . . .[I]nto contracts with State or territorial officials for the custody, care, subsistence, education, treatment, and training of State or territorial prisoners, upon certification with respect to the availability of proper and adequate treatment

In sum, it appears that the Bureau at some undisclosed time simply decided to alter its interpretation of § 5003 to allow it to devote a significant percentage of its maximum security facilities to housing state prisoners, without regard to whether the state inmates needed treatment.[6]

There are limitations on the interpretive roles of administrative agencies that are "grounded in the language, purpose, and

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facilities and personnel, pursuant to section 5003 of Title 18 of the United States Code.

28 C.F.R. § 0.95(g) (1979).

[6]Perhaps the most telling evidence that the Bureau has fashioned an administrative construction of § 5003 of recent vintage to meet its desire to house an increasing number of state prisoners are the statistics reported by the Justice Department concerning admissions to Bureau institutions each year. Published annually in the Department's "Statistical Report" series, the data indicate a 170 percent growth in annual admissions beginning in FY 1976. (See Appendix A.) The figure has undoubtedly increased since FY 1977, since at present there are 836 state prisoners in Bureau of Prisons' institutions. These institutions are divided into six security levels. Of the 836 state contract prisoners in federal custody as of Dec. 31, 1980, 343 resided in the five maximum security penitentiaries that comprise the Level 5 and 6 facilities; another 179 resided in Level 4 facilities. See Bureau of Prisons, I.I.S. Report No. 81.06 (these figures were furnished to petitioner's counsel by the Department of Justice).

history of the particular statute . . . ." Teamsters v. Daniels, 439 U.S. 551, 566 (1979). An agency's administrative construction must be consistent with the Congressional purpose, Morton v. Ruiz, 415 U.S. 199, 237 (1973), and judicial deference to even long-term agency constructions "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726, 745 (1973). Since the Bureau's present construction of § 5003 violates Congressional intent as well as the Government's earlier view, it is entitled to no weight.

POINT II

THE GOVERNMENT'S INTERPRETATION OF SECTION 5003 FRUSTRATES EFFORTS AT REHABILITATION AND CAUSES HARDSHIP TO INMATES.

The Government's interpretation of Section 5003 is as unfortunate a policy decision as it is an incorrect reading of the statute. Under the present administration of the contract program, the majority of state prisoners are concentrated in the Bureau's most secure facilities;[7] apparently, while in these facilities they are incarcerated under conditions no different from other maximum security and long-term inmates. See Battick v. Stoneman, 421 F. Supp. 213, 225 (D. Vt. 1976). Thus, the present "treatment" of most contract inmates is long-term incarceration in maximum security institutions. State prisoners incarcerated under these conditions suffer the worst of both worlds--while they are subject to substantial deprivations not suffered by the

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[7] See footnote 6, supra, at 18.

inmates incarcerated in home-state prisons, they may be unable to take advantage of benefits available to federal prisoners. As a result, the current administration of § 5003 frustrates, rather than aids, the "treatment" and rehabilitation of state convicts.

Inmates transferred from a state jurisdiction to federal custody suffer a number of special hardships. The transfer to a location far from an inmate's home state will often mean a complete cessation of visits from family and friends. For example, in Lono v. Fenton, supra, the appellant, transferred from Hawaii to the federal penitentiary in Marion, Illinois had not received a visit from his family or friends in over ten years. 581 F.2d at 646. The distance of Lono's separation from his family, and the length of time without a visit is typical, rather than unique for contract prisoners. [8]

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[8] See, e.g., Anthony v. Wilkinson, ___ F.2d ___, No. 79-2362 et. al., (7th Cir., Dec. 23, 1980)

It is universally accepted that the opportunity to visit with family members and maintain family ties may play a crucial part in determining an inmate's chance for rehabilitation. Indeed, the existence of a supportive family relationship is one of the few factors that statistically can be shown to have an effect in combatting recidivism. Uniform Law Commissioners Model Sentencing and Corrections Act, Comment to § 4-116, at 261 (1979); Homer, Inmate-Family Ties: Desirable but Difficult, 43 Fed. Prob. 47 (Mar. 1979). Accordingly, Justices of

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(prisoners from Alaska, Hawaii, Vermont, Delaware, and New Mexico in Marion, Illinois); Tai v. Thompson, 387 F. Supp. 912 (D. Hawaii 1975) (Hawaii prisoners in Atlanta); Fletcher v. Warden, ___ F.2d ___, Nos. 79-1156, 79-2062, 80-1749 (10th Cir., Feb. 13, 1981) (Delaware and Connecticut prisoners in Leavenworth, Kansas); Capitan v. Cupp, 356 F. Supp. 302 (D. Ore. 1972) (Oregon prisoners in Leavenworth). The records office at the federal penitentiary in Leavenworth, Kansas has informed us that the facility presently houses state contract prisoners, inter alia, from Alaska, Hawaii, Maine, Massachusetts, Connecticut, Vermont, Delaware and the Virgin Islands.

this Court,[9] Uniform Law Commissioners,[10] professional organizations of all varieties,[11] and international bodies,[12] have prodded institutions to provide generous opportunities for family visits. As the 1967 Task Force on Corrections stated:

> The task of corrections therefore includes rebuilding solid ties between offender and community, integrating or reintegrating the offender into community life--restoring family ties, obtaining employment and education, securing in the larger sense a plan for the

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[9] E.g., address by Chief Justice Warren Burger, Annual Report to the American Bar Association, Feb. 8, 1981 (Transcript of remarks at 10) (calling for "[g]enerous family visitations in decent surroundings to maintain family ties").

[10] Uniform Law Commissioners, Model Sentencing and Corrections Act, §§ 4-115 & 4-116 (1979).

[11] National Sheriffs' Association, Handbook on Inmates' Legal Rights 42 (1974); Correctional Law Project, American Correctional Association, Model Correctional Rules and Regulations 44-47 (rev. ed. 1979); American Correctional Association, Manual of Correctional Standards 542 (1966).

[12] European Committee on Crime Problem, Standard Minimum Rules for the Treatment of Prisoners, ¶ 37, at 15 (1973).

> offender in the routine functioning of society.

President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections at 7 (1967). The task of rehabilitating inmates is made immeasurably more difficult when inmates are transferred thousands of miles, as is common in § 5003 cases.

Separation from one's family is not the only hindrance to an inmate's rehabilitative prospects that can occur by reason of a § 5003 transfer. Transfers may result in the interruption of an inmate's education or work programs. See Hoitt v. Vitek, 361 F. Supp. 1238, 1248 (D. N.H.), aff'd sub nom. Laaman v. Vitek, 502 F.2d 1158 (1st Cir. 1973). Even if vocational or educational training is available to the arriving inmate, his incarceration may be prolonged because the state refuses to award good-time credit for the training accomplished out-of-state.[13]

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[13] See DEL. CODE ANN. tit. 11, § 4384 (1980

A transfer from the state to federal system may also impair an inmate's opportunity for parole by effectively foreclosing his ability to appear in person before his state parole board. At present, in 48 of the 50 states, inmates may appear at some point before parole boards for in-person hearings. See V. O'Leary & K. Hanrahan, Parole Systems in the United States 36-38 (3rd ed. 1976).[14] With rare exceptions, the contract inmate will be unable to take advantage of this important opportunity. See Hoitt v. Vitek, supra, 361 F. Supp. at 1249 (a personal appearance is very important; an inmate's inability to be present would likely be detrimental).[15] Moreover, the inmate may

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Supp.) (granting rehabilitative achievement good-time for participation in programs "offered by the Department" of Corrections). We are aware of no instance where such good time has been granted to a Delaware inmate confined out-of-state.

[14] The two states that do not grant inmates a right to appear nevertheless provide their parole boards with the discretion to call for an inmate's appearance. See Parole Systems in the United States, supra, at 31; GA. CODE ANN. § 77-516 (1973); TEX. CODE CRIM PROC. ANN. art. 42.12, § 15(f) (1979).

[15] It appears that the only opportunity for a

find it more difficult to arrange an appropriate release plan if he is several thousand miles from his home.

The distance between the inmate's home state and the federal institution may impair his communication with counsel. See, e.g., Rebideau v. Stoneman, 398 F. Supp. 805, 811 (D. Vt. 1975); Tai v. Thompson, 387 F. Supp. 912, 915-916 (D. Hawaii 1975). For the inmate without counsel, access to the courts will also be impaired. While federal institutions have materials on federal law, they do not ordinarily contain state law materials. See Bureau of Prisons Program

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contract inmate to appear personally before the parole board deciding his fate will take place in the case where a state parole hearing panel visits the federal prison where the inmate is located.

The United States Parole Commission has recently adopted a regulation providing for the holding of "Courtesy Hearings"--hearings where the state inmate appears before members of the United States Parole Commission--in cases where "resources permit" and where the institution is a "substantial distance" from the requesting state. United States Parole Commission Policy and Procedures Memo No. 80/12 (May 1, 1980). Of course, even if a state inmate is able to arrange a courtesy hearing, he will not be heard by the authority with the power to release him.

Statement 1315.3 (July 16, 1979) (Inmate Legal Activities--includes a list of required law library materials); Lono v. Fenton, supra, 581 F.2d at 646 (Hawaii legal materials not available at Marion Penitentiary).

In sum, the transfers of state inmates over long distances and across jurisdictions carry special hardships, and impair the prospects of successful rehabilitation. As one judge has perceptively noted:

> Transfer to a foreign jurisdiction has traditionally been regarded as altogether different [from transfers within a jurisdiction]: to be cast outside the jurisdiction within which one was sentenced is often to be separated from rights and privileges and standards otherwise available--to become, to some degree, a "man without a country".

Gomes v. Travisono, 490 F.2d 1209, 1217 (1st Cir. 1973) (Campbell, J., concurring), vacated, 418 U.S. 909, aff'd as modified, 510 F.2d 537 (1974).

It may well be that the recognition of these hardships could have motivated

Congress to adopt a statute permitting transfers only in those cases where the rehabilitative benefits to be gained from the transfer were substantial. We submit that is precisely the course that Congress chose. Despite the possible cost-effectiveness of renting out maximum security prison space to the states, Congress limited the receipt of state prisoners to "treatment facilities." To read that phrase out of that statute is to permit a perversion of Congress' purpose in enacting it.

CONCLUSION

For the above stated reasons, the judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX A

Admissions of State Prisoners to Bureau of Prisons Institutions

For years the Department of Justice has published an annual statistical report detailing the number and characteristics of individuals who have been committed to the custody of the Attorney General of the United States and are held in Bureau of Prisons' institutions. Since FY 1969 the Department has included data in this report without interruption on the admissions of state prisoners to Bureau institutions.

The following table contains data from these reports for those fiscal years. The graph is included to illustrate the trend in state prisoner admissions during that time.

Fiscal Year	Total State Prisoners Admitted
1969	55
1970	68
1971	55
1972	56
1973	69
1974	47*
1975	61*
1976	105
1977	134

Source: FY 1969-FY 1973, U.S. Department of Justice, Federal Bureau of Prisons. "Statistical Reports. Fiscal years 1969, 1970, 1971, 1972, 1973." Table: Other Admissions to Bureau of Prisons Institutions, Excluding Court Commitments. Section B: Admission Tables.

-FY 1974, U.S. Department of Justice, Law Enforcement Assistance Administration; National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics - 1976. Table 6.78,

*Report indicates data 78% complete.

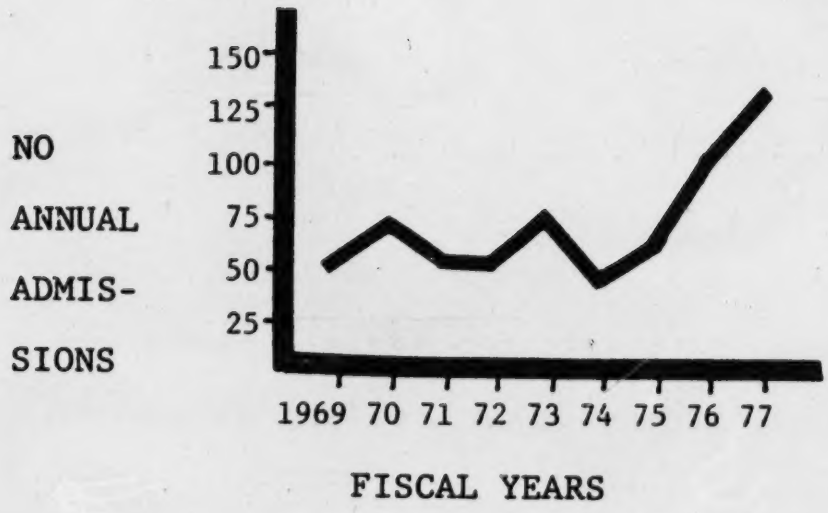
p. 722.

-FY 1975, U.S. Department of Justice, Federal Prison System, "Statistical Report, Fiscal Year 1975." Table B-12-1, p. 78.

-FY 1976, U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics - 1978. Table 6.58, p. 650.

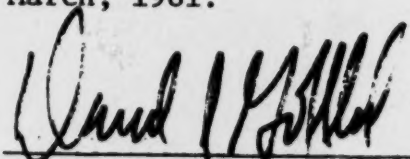
-FY 1977, U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics - 1979. Table 6.36, p. 650.

NUMBER OF STATE PRISONERS ADMITTED ANNUALLY TO BUREAU OF PRISONS' INSTITUTIONS, FY 1969 - FY 1977



Counsel wishes to thank Christopher McKenzie, Steven Zinn, Wendy Watts-Johnson, and Richard Hodson for their help in the preparation of this brief.

I, David J. Gottlieb, a member of the bar, hereby certify that three copies of this motion and brief were served upon the Solicitor General of the United States, the Attorney General of the State of Vermont, and counsel for petitioner by depositing the same in the United States Mail on this 12th day of March, 1981.



DAVID J. GOTTLIEB